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No. 88-

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD D. SHAPERO - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED

1. May a state court, on remand, amend the findings based on which its decision was reversed by the Supreme Court of the United States and utilize the amended findings as a foundation for denying further affirmative relief including attorneys' fees under 42 U.S.C. section 1988?

2. May a petitioner who has, under the First Amendment, successfully challenged a state court decision prohibiting targeted direct mail attorney solicitations, nonetheless be denied attorneys' fees on remand on the basis that he did not obtain "personal redress" in the Supreme Court of the United States?

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v.

KENTUCKY BAR ASSOCIATION - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner, Richard D. Shapero, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky.

CITATION TO PREVIOUS OPINION AND OPINIONS BELOW

The opinion of the Supreme Court of the United States in *Shapero* v. *Kentucky Bar Association,* 486 U.S. —, 108 S. Ct. 1916 (1988) is reproduced in the Appendix to this petition at 1a to 27a. The first opinion of the Supreme Court of Kentucky, on remand, styled *Shapero* v. *Kentucky Bar Association,* 763 S.W. 2d 126 (Ky. 1989) (hereafter referred to as "*Shapero II*"), is reproduced in the Appendix to this petition at 28a to 32a. The second opinion of the Supreme Court of Kentucky, on remand, styled *Shapero* v. *Kentucky Bar Association,* No. 86-SC-335-KB (Ky. April 6, 1989) (hereafter referred to as "*Shapero III*"), is

reproduced in the Appendix to this petition at 33a to 34a. The opinion of the Supreme Court of Kentucky, which was reversed by the Supreme Court of the United States, styled *Shapero* v. *Kentucky Bar Association,* 726 S.W.2d 299 (Ky. 1987) (hereafter referred to as "*Shapero I*"), is reproduced in the Appendix to this petition at 35a to 40a.

JURISDICTION

The judgment of the Supreme Court of Kentucky denying the Petitioner attorneys' fees was entered on January 19, 1989. The judgment of the Supreme Court of Kentucky refusing to take any action whatsoever on remand from the Supreme Court of the United States was entered on April 6, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1257(3).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Article III, Section 1 of the Constitution of the United States, which provides in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

This case involves 42 U.S.C. section 1988, which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. sections 1981-1983, 1985, and 1986], title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This case also involves 42 U.S.C. section 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

> States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On March 27, 1987, in *Shapero I,* the Supreme Court of Kentucky adopted American Bar Association Model Rule 7.3, which prohibited targeted direct mail solicitation by attorneys in Kentucky. In so doing, the Supreme Court of Kentucky, in explaining the procedural background of the case, held:

> Shapero requested an opinion from the Ethics Committee of the Kentucky Bar Association about [the] propriety of the proposed letter. The Ethics Committee disapproved the submitted form of direct mail letter. Shapero then petitioned this Court for review of the Advisory Opinion and the rule which was granted.
>
> * * *
>
> We affirm the decision of the Ethics Committee to deny the request.

Shapero I, 726 S.W.2d at 300-01, 36a, 40a.

On October 5, 1987, Shapero's Petition for Certiorari was granted. In an opinion issued on June 13, 1988, the Supreme Court of the United States reversed the Supreme Court of Kentucky's decision in *Shapero I,* and held that the rule in question, on its face, was unconstitutional under the First and Fourteenth

Amendments to the Constitution of the United States and remanded the case for further proceedings. In so doing, this Court made the following finding:

> The court below disapproved petitioner's proposed letter solely because it targeted only persons who were "known to need [the] legal services" offered in his letter. . . .

108 S. Ct. at 1921, 6a (quoting *Shapero I*, 726 S.W.2d at 301, 39a) (brackets in original).

On remand, Shapero filed a motion for an award of attorneys' fees under 42 U.S.C. section 1988. In its Opinion and Order, the Supreme Court of Kentucky denied Shapero's motion because Shapero had obtained no "personal redress" in his case and accordingly, the Shapero case bore "no similarity to a section 1983 action." *Shapero II*, 763 S.W.2d at 128, 31a, 32a. In order to reach this conclusion, however, the Supreme Court of Kentucky altered its decision in *Shapero I* which had "affirm[ed] the decision of the Ethics Committee to deny the request [of Shapero to send out his targeted direct mail letter]." *Shapero I*, 726 S.W.2d at 301, 40a. Instead, the Supreme Court of Kentucky in *Shapero II* ruled that its opinion in *Shapero I* had "erroneously stated that we affirmed the decision of the Ethics Committee in denying the request [of Shapero to send his targeted direct mail letter]." *Shapero II*, 763 S.W.2d at 128, 31a.

On February 16, 1989, Shapero petitioned the Supreme Court of Kentucky, consistent with this Court's mandate on remand, to approve the advertisement

which he had proposed, or to transfer the matter for further consideration to the Advertising Commission of the Kentucky Bar Association and to issue an order deleting the targeted direct mail ban that had been adopted in *Shapero I*. But in an order entered on April 6, 1989, the Supreme Court of Kentucky held that it was "both unnecessary and inappropriate for us to take any further action." *Shapero III*, slip op. at 1, 33a. With respect to Shapero's request that the Supreme Court of Kentucky approve his advertisement, the court held, "The issue of approval has never been before this Court." *Id.* at 2, 34a.

Thus, the Supreme Court of Kentucky in *Shapero II* and *Shapero III* amended the *Shapero I* decision *after* it had been reversed by the Supreme Court of the United States. The revised holding by the Supreme Court of Kentucky was that "neither the Committee nor this Court denied any request [of Shapero to send out his targeted direct mail letter]." *Shapero II*, 763 S.W.2d at 128, 31a. As a result, the decisions of the Supreme Court of Kentucky in *Shapero II* and *Shapero III* now directly conflict with the explicit finding made by the Supreme Court of the United States in reversing *Shapero I* that "[t]he court below disapproved petitioners' proposed letter. . . ." 108 S. Ct. at 1921, 6a.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions of whether Shapero is entitled to have the letter in question approved and of

whether he is entitled to an award of attorneys' fees under 42 U.S.C. section 1988 were raised by Shapero when he petitioned the Supreme Court of Kentucky for an award of attorneys' fees on October 4, 1988, and for a final judgment on February 16, 1989.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Involves an Important Question Which Directly Affects this Court's Jurisdiction and Is in Conflict With This Court's Decision in *Shapero* v. *Kentucky Bar Association*.

In denying attorneys' fees in *Shapero II* and in refusing to take any further action on remand in *Shapero III*, the Supreme Court of Kentucky amended its holding in *Shapero I* to contradict an explicit finding made by this Court in its opinion reversing *Shapero I*, and then used that amended holding as a basis for denying the requested relief. The Supreme Court of Kentucky's actions raise the substantial Constitutional question under Article III, Section 1, of whether, on remand after reversal, an inferior court is free to recast its prior decision in a fashion which directly contradicts an explicit finding made by this Court and deprives the successful petitioner of the relief granted by this Court.

In its opinion denying attorneys' fees, the Supreme Court of Kentucky held, "[We were] in error in assuming that there was a 'request' [to approve the letter] before us to deny, but this mistake does not create a right where none exists." *Shapero II*, 763 S.W.2d at 128, 32a. And in *Shapero III*, in refusing to consider the letter Shapero had requested permission to

mail nearly four years before, the Supreme Court of Kentucky held, "The issue of approval [of the Shapero letter] has never been before this Court." *Shapero III,* slip op. at 2, 34a. The Supreme Court of Kentucky thereby renounced its previous holding which was: "We affirm the decision of the Ethics Committee to deny the request [of Shapero to mail his letter]." *Shapero I,* 726 S.W.2d at 301, 40a.

When Shapero was first before this Court, he, the Kentucky Bar Association (hereafter "KBA") and this Court all believed that the Supreme Court of Kentucky had denied his request to mail the letter in issue. This is evident from the briefs which were submitted to this Court by Shapero and by the KBA, by the questions and responses in oral argument, and by this Court's opinion.

For example, the KBA admitted in its brief, as well as in oral argument before this Court, that the Supreme Court of Kentucky had considered Shapero's letter in its decision. As stated in the KBA brief, "[T]he [Supreme] Court [of Kentucky] did not approve Shapero's letter, [and] the only conclusion which can be drawn is that the Court held that the use of Shapero's letter was likely to result in the evils of being misleading, overbearing, or of involving other features of deception or improper influence." (Brief For Respondent, page 21).

During oral argument on March 1, 1988, the following exchange took place between Mr. Justice Rehnquist and Mr. Doheny, counsel for the KBA:

QUESTION: Did the Kentucky supreme court disapprove this letter? It did, did it not?

MR. DOHENY: It did.

QUESTION: It disapproved it, did it not?

MR. DOHENY: Yes.

QUESTION: And did it not disapprove it on the basis of the new rule?

MR. DOHENY: Yes.

QUESTION: Well, then, why is the case here? That's what he's bringing here.

(Transcript of the March 1, 1988 Oral Hearing, page 29).

When questioned by Mr. Justice Scalia, Mr. Doheny tried unsuccessfully to retract the admission made to Mr. Justice Rehnquist that the Supreme Court of Kentucky had disapproved Shapero's letter.

QUESTION: Mr. Doheny, it would be a different question if all the Kentucky Supreme Court did was to say, "You're right, the old rule is no good; we're adopting a new rule."

But it didn't just do that. You say that it went further, and in that situation, I can understand why you would say you would have to go back and see whether, under state law, this thing is banned under the new rule.

But the court didn't stop there. It said, "We're adopting this new rule and your letter is banned under the new rule."

MR. DOHENY: Well, perhaps I —

QUESTION: Did it say that or not? If it didn't say that, you have a different case.

MR. DOHENY: Well, perhaps I overstated it, Mr. Justice Scalia, because it does not say in the opinion that they made a finding with respect to this letter. They simply say that, with respect to Rule 7.3, this is an appropriate rule which we now adopt as the law of this government.

QUESTION: Well, your response to one of the other Justice' [sic] questions was that, indeed, there has been a determination that this letter is no good. Now, you're saying there has not been?

MR. DOHENY: I believe I was in error when I said that, Justice.

QUESTION: I don't think so. The next sentence [of the Supreme Court of Kentucky's opinion] says, "We affirm the decision of the ethics committee to deny the request." And the request is to mail out this letter.

So I think they not only set out the appropriate rule we should adopt as the law in the case, but they then go on and affirm the ruling.

(Transcript of the March 1, 1988 Oral Hearing, pages 30-31).

Regardless of what the KBA argued, however, this Court's *opinion* in *Shapero* v. *Kentucky Bar Association* conclusively adjudicated this issue:

- The Supreme Court of Kentucky's disposition of the case below was to adopt Model Rule 7.3 and to " 'affirm the decision of the Ethics Committee to deny [petitioner's] request' for approval of his letter." 108 S. Ct. at 1920 n.3, 4a, (quoting *Shapero I*, 726 S.W.2d at 301, 40a) (brackets in original).

- "The Court below disapproved petitioner's proposed letter solely because it targeted only persons who were 'known to need [the] legal services' offered in his letter, 726 S.W.2d at 301, rather than the broader group of persons 'so situated that they might in general find such services useful.' " 108 S. Ct. at 1921, 6a (brackets in original).

Unquestionably, therefore, this Court based its decision upon the explicit finding that the Supreme Court of Kentucky had ruled upon and denied Shapero's request to mail his letter. The Supreme Court of Kentucky's redetermination on remand that it had *not* previously considered Shapero's request to mail his letter, therefore, contradicts an explicit finding made by this Court.

If the decisions of the Supreme Court of Kentucky on remand are allowed to stand in their published form[1], the Supreme Court of Kentucky will have been permitted to directly challenge not only the basic concept of a "supreme Court" established under Article III, Section 1 of the Constitution of the United States, but also more than a century of decisions from this Court which reinforce its "supremacy" over inferior courts.

Inferior courts have always been required to follow to the letter decisions of the Supreme Court of the

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[1]On the face of both the *Shapero II* and *Shapero III* decisions, the Supreme Court of Kentucky ordered that they were "TO BE PUBLISHED."

United States following remand. As this Court held in *Ex parte Howard*, 76 U.S. (9 Wall.) 175, 183 (1869):

> [I]t is the duty of all inferior courts to yield a prompt obedience to the mandate of this court; or, in other words, to treat as conclusive the judgment of this court *upon the law and facts presented to it* in appropriate form for consideration. Any other conduct would be subversive of the relation which the Constitution intends that inferior tribunals shall hold to this court. . . . The inferior court cannot re-open the case. . . .

(Emphasis added). Or as this Court held in *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895),

> When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered finally settled. . . . The court cannot vary it, or examine it for any other purpose than execution; . . . or review it *even for apparent error, upon any matter decided on appeal;* or intermeddle with it, further than to settle so much as has been remanded.

(Emphasis added). *See also Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425 (1978). An inferior court, on remand, is required to treat as conclusive the determinations and findings of this Court. Therefore, the Supreme Court of Kentucky was not free to ignore this Court's finding that Shapero's request was denied by the Supreme Court of Kentucky, *even if the Supreme Court of Kentucky believed that finding to be in error.*

In *Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 253 (1872), the plaintiff successfully challenged in the Supreme Court of the United States the dismissal by the Supreme Court of Missouri of his petition. In so doing, this Court determined that the plaintiff had legal title to the disputed land and remanded the case for further proceedings in conformance with this Court's opinion. On remand, the Supreme Court of Missouri amended its previous judgment and dismissed the petition because the petition sought equitable relief with respect to the land in dispute, and legal title to the land could not be determined in an equitable proceeding. Since the plaintiff had an adequate remedy at law, the Missouri court concluded that the suit could not be maintained.

In once again reversing the Supreme Court of Missouri, the Supreme Court of the United States held:

> State courts have no power to deny the jurisdiction of this court in a case brought here for decision and sent back with the mandate of the court, which is its judgment. Such a question, that is the question whether the legal title was in the plaintiff, and whether or not he had a plain, adequate and complete remedy at law, might have been raised in the court of original jurisdiction, and perhaps it might have been raised here when the case was before the court on the first writ of error, but it is clear that it was too late to raise any such questions after the whole case had been decided and the cause remanded for final judgment.

84 U.S. at 284-85 (footnote omitted).

Just as the Supreme Court of Missouri erred when it ruled that the case was improperly before it because an equitable, as opposed to a legal petition, had been filed, so too did the Supreme Court of Kentucky err when it held that Shapero's request to mail his letter was not properly before it and it therefore could not have rendered any decision with respect to that request. However, paraphrasing *Tyler,* on remand of Shapero's case, it is "clear that it [is] too late [for the Supreme Court of Kentucky] to raise any such questions after the whole case ha[s] been decided and the cause [has been] remanded for final judgment." If Missouri or Kentucky courts were permitted to reconsider findings made by the Supreme Court of the United States, this procedure "would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect." *Tyler,* 84 U.S. at 282-83. In addition, permitting inferior courts, on remand, to ignore this Court's findings would bode ill for any concept of a *Supreme* Court of the United States under Article III, Section 1 of the Constitution of the United States.

Since this Court is, by and large, a court of appellate jurisdiction which must rely on inferior courts to carry out its mandates, it is of critical importance that these inferior courts abide by and act consistently with this Court's findings. Accordingly, a writ of certiorari to review and summarily to reverse the judgment below is of importance far beyond the facts of this case.

2. The Decision Below Conflicts with Recent Decisions of this Court and of Federal Courts of Appeals and with the Legislative History of the Civil Rights Attorney's Fees Act of 1976.

The Supreme Court of Kentucky in its decision, on remand, in *Shapero II,* ruled that in a proceeding brought to vindicate civil rights, unless a petitioner prevails *and* obtains "personal redress," he or she may not be awarded attorneys' fees under 42 U.S.C. section 1988. Under the holding of the Supreme Court of Kentucky, for example, a plaintiff who is successful in obtaining a declaration that a particular governmental policy, such as an advertising ban, is unconstitutional may not recover attorneys' fees unless he or she obtains personal redress above and beyond the mere declaration that the governmental policy was illegal. Similarly, under *Shapero II,* a class plaintiff who is ultimately unsuccessful in obtaining personal redress may not recover attorneys' fees even though complete relief on all class claims is obtained. Essentially, the Supreme Court of Kentucky has read out of 42 U.S.C. section 1988 any concept of "private attorneys general" as a basis for the recovery of attorneys' fees. Not only is this decision ill-conceived and flatly contrary to the well-nigh universal rule that private attorneys general are permitted to recover attorneys' fees in civil rights cases, but it also directly conflicts with the legislative history of 42 U.S.C. section 1988, prior decisions of this Court, and the decisions of numerous federal courts of appeal.

In the legislative history of the Civil Rights Attorney's Fees Act of 1976 in S. REP. NO. 1011, 94th Cong., 2d Sess. (1976) at 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910, the Senate Committee emphasized the importance of the "private attorneys general" concept in awarding attorneys' fees, quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968):

> If [the plaintiff] obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.

See also H. R. REP. NO. 1558, 94th Cong., 2d Sess. (1976) at 2. The private attorneys general concept is firmly rooted in early congressional debates which ultimately led to the passage of 42 U.S.C. section 1988. This concept can be traced back at least to June 12, 1975, when one of the sponsors of the Federal Courts Attorney's Fees Act of 1975 (H.R. 7826, 94th Cong., 1st Sess. (1975)) stated:

> What is most distressing about *Alyeska* [*Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)] is that it will discourage and effectively preclude the filing of meritorious public interest cases seeking the enforcement of Federal law. These "private attorney general" cases are an integral part of the overall national system to enforce the laws and civil and Constitutional rights. These public interest cases have frequently vindicated important public rights, *not simply private causes of actions.*

(Emphasis added.) 121 CONG. REC. H5418 (daily ed. June 12, 1975) (statement of Rep. Seiberling).

This Court recently emphasized that the 1976 Attorney's Fees Act, 42 U.S.C. section 1988, was clearly meant to apply to such private attorneys general, public issue cases in *Texas State Teachers Association* v. *Garland Independent School District*, 57 U.S.L.W. 4383 (U.S. March 28, 1989) (No. 87-1759). In *Garland*, the petitioners, although they had obtained no purely personal relief, had "obtained a judgment vindicating the First Amendment rights of public employees in the workplace. Their success ha[d] materially altered the school district's policy limiting the rights of teachers to communicate with each other concerning employee organizations and union activities." Similarly, Shapero, in the decision of the Supreme Court of the United States, vindicated important First Amendment rights of Kentucky and other attorneys, as a group. Paraphrasing *Garland*, his success has materially altered the Kentucky Bar Association's policy limiting the rights of attorneys to communicate with prospective clients concerning employment.

By achieving similar relief, in *Garland*, the Supreme Court of the United States held that "Petitioners have thus served the 'private attorney general' role which Congress meant to promote enacting the Civil Rights Attorney's Fees Awards Act of 1976." Shapero has accomplished no less by his success in the Supreme Court of the United States.

Not only does the Supreme Court of Kentucky's decision depreciate any concept of the "private attorney general," but, taken literally, its "personal redress" precondition to an award of attorneys' fees would preclude the granting of attorneys' fees to prevailing parties who have sought only declaratory but not personal relief.

Three months before the Supreme Court of Kentucky denied Shapero's request for attorneys' fees, this Court set forth the relationship between declaratory judgments and section 1988 attorneys' fees awards in *Rhodes* v. *Stewart,* 109 S. Ct. 202 (1988). "A declaratory judgment, in this respect is no different from any other judgment. It will constitute relief, for purposes of section 1988, if, and only if, it affects the behavior of the defendant towards the plaintiff." 109 S. Ct. at 203. No one could deny that this Court's decision in *Shapero* affected the behavior of the Kentucky Bar Association towards the Plaintiff Shapero. Following the Supreme Court of the United States' decision in *Shapero,* the Supreme Court of Kentucky and the Kentucky Bar Association could no longer apply to Shapero, or any other Kentucky lawyer, the rule declared unconstitutional by the Supreme Court of the United States in its *Shapero* decision.

Similarly, the very case that the Supreme Court of Kentucky held was "inapposite" in *Shapero II,* because the plaintiffs in that case had obtained "personal

redress," whereas Shapero had not, was a case in which the plaintiffs obtained *only* a declaratory judgment, but were nonetheless awarded attorneys' fees under section 1988. In that case, *Americans United for Separation of Church and State* v. *School District of Grand Rapids,* 835 F.2d 627 (6th Cir. 1987), the plaintiffs were residents and taxpayers of Grand Rapids, Michigan, and obtained a declaration under the Federal Declaratory Judgment Act, 28 U.S.C. sections 2201-2202, that the program in which a public school system leased classrooms and buildings from religious non-public schools violated the Establishment Clause of the First Amendment and obtained a permanent injunction against continuation of the program. Likewise, Shapero obtained a declaration that the blanket prohibition against targeted direct mail advertising by lawyers was unconstitutional. Thus, the "personal redress" obtained by the plaintiffs in *Americans United* was no more personal than the redress obtained by Shapero. In essence, both Shapero and the plaintiffs in *Americans United* only obtained declaratory relief and were, therefore, equally entitled to attorneys' fees under section 1988.

The Supreme Court of Kentucky's holding in *Shapero II* is contrary to the holdings in several other Court of Appeals cases where the plaintiffs obtained declaratory but no personal relief yet were still held to be entitled to attorneys' fees under section 1988: *Nash* v. *Chandler,* 848 F.2d, 567 (5th Cir. 1988) (plaintiffs dropped damage claims and obtained a declara-

tion that statute was unconstitutional); *Seattle School District No. 1* v. *State of Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982) (plaintiffs obtained declaration that statute was unconstitutional); *McCurry* v. *Tesch*, 824 F.2d 638 (8th Cir. 1987) (plaintiffs obtained declaratory judgment but failed to win damages and an injunction); and *Solomon* v. *City of Gainesville*, 796 F.2d 1464 (11th Cir. 1986) (city sign ordinance declared unconstitutional; plaintiff waived damages claim).

The direct conflict between the opinion of the Supreme Court of Kentucky and decisions of this Court, other federal courts and the legislative history of 42 U.S.C. section 1988 justifies the granting of certiorari to review the judgments of the Supreme Court of Kentucky in *Shapero II* and *Shapero III*.

CONCLUSION

This is the second time this case will have been before the Supreme Court of the United States. In *Shapero* v. *Kentucky Bar Association*, 108 S. Ct. 1916 (1988), this Court reversed a targeted direct mail solicitation blanket ban adopted by the Supreme Court of Kentucky in the face of this Court's explicit and unambiguous holding in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Once again this Court is faced with a decision by the Supreme Court of Kentucky which contradicts well-established precedents of this Court upholding awards of attorneys' fees to prevailing parties who have obtained substan-

tial relief and who have fundamentally altered the legal relationship between themselves and the responding parties. This Court should not tolerate the Supreme Court of Kentucky's bold rejection of its responsibilties under explicit federal law and rules decisions through the expedient of changing its findings after those findings have already been employed as a basis for reversal in this Court. This Court should not permit the Supreme Court of Kentucky or any court to ignore its findings or its mandates.

Petitioner's writ of certiorari should be granted, the decisions of the Supreme Court of Kentucky in *Shapero II* and *Shapero III* should be summarily reversed, and this Court should order that attorneys' fees in the amount sought by the Petitioner be awarded.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 87-16

RICHARD D. SHAPERO, PETITIONER *v.* KENTUCKY BAR ASSOCIATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[June 13, 1988]

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court as to Parts I and II and an opinion as to Part III in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE KENNEDY join.

This case presents the issue whether a State may, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

I

In 1985, petitioner, a member of Kentucky's integrated Bar Association, see Ky. Sup. Ct. Rule 3.030 (1988), applied to the Kentucky Attorneys Advertising Commission[1]

[1]The Attorneys Advertising Commission is charged with the responsibility of "regulating attorney advertising as prescribed" in the Rules of the Kentucky Supreme Court. Ky. Sup. Ct. Rule 3.135(3) (1988). The Commission's decisions are appealable to the Board of Governors of the Kentucky Bar Association, Rule 3.135(8)(a), and are ultimately reviewable by the Supreme Court of Kentucky. Rule 3.135(8)(b). "Any attorney who is in doubt as to the propriety of any professional act contemplated by him" also has the option of seeking an advisory opinion from a committee of the Kentucky Bar Association, which, if formally adopted by the Board of Governors, is reviewable by the Supreme Court of Kentucky. Rule 3.530.

for approval of a letter that he proposed to send "to potential clients who have had a foreclosure suit filed against them." The proposed letter read as follows:

> "It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by *ORDERING* your creditor [*sic*] to *STOP* and give you more time to pay them.
>
> "You may call my office anytime from 8:30 a. m. to 5:00 p. m. for *FREE* information on how you can keep your home.
>
> "Call *NOW*, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is *FREE*, there is *NO* charge for calling."

The Commission did not find the letter false or misleading. Nevertheless, it declined to approve petitioner's proposal on the ground that a then-existing Kentucky Supreme Court rule prohibited the mailing or delivery of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." Ky. Sup. Ct. Rule 3.135(5)(b)(i).[2] The Commission registered its view that Rule 3.135(5)(b)(i)'s ban on targeted, direct-mail advertising violated the First Amendment—specifically the principles enunciated in *Zauderer* v. *Office of Disciplinary*

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[2]Rule 3.135(5)(b)(i) provided in full:

"A written advertisement may be sent or delivered to an individual only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."

Counsel of Supreme Court of Ohio, 471 U. S. 626 (1985)—and recommended that the Kentucky Supreme Court amend its rules. See App. to Pet. for Cert. 11a-15a. Pursuing the Commission's suggestion, petitioner petitioned the Committee on Legal Ethics (Ethics Committee) of the Kentucky Bar Association for an advisory opinion as to the Rule's validity. See Ky. Sup. Ct. Rule 3.530; n. 1, *supra*. Like the Commission, the Ethics Committee, in an opinion formally adopted by the Board of Governors of the Bar Association, did not find the proposed letter false or misleading, but nonetheless upheld the Rule 3.135(5)(b)(i) on the ground that it was consistent with Rule 7.3 of the American Bar Association's (ABA) Model Rules of Professional Conduct (1984). App. to Pet. for Cert. 9a.

On review of the Ethics Committee's advisory opinion, the Kentucky Supreme Court felt "compelled by the decision in *Zauderer* to order [Rule 3.135(5)(b)(i)] deleted," 726 S. W. 2d 299, 300 (1987), and replaced it with the ABA's Rule 7.3, which provides in its entirety:

> " 'A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.' " 726 S. W. 2d, at 301 (quoting ABA, Model Rule of Professional Conduct 7.3 (1984)).

The court did not specify either the precise infirmity in Rule 3.135(5)(b)(i) or how Rule 7.3 cured it. Rule 7.3, like its predecessor, prohibits targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading. We granted certiorari to resolve whether such a blanket prohibition is consistent with the First Amendment, made applicable to the States through the Fourteenth Amendment, 484 U.S. ____ (1987), and now reverse.[3]

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[3]We reject respondent's request that we dismiss or affirm this case because "the Supreme Court of Kentucky granted Shapero precisely the relief which he requested." Brief for Respondent 11. The court below did, as respondent prayed, "declare . . . rule [3.135(5)(b)(i)] void," Motion for Review of Advisory Opinion E-310, No. 86-SC-335 (Sup. Ct. Ky.). The court's ultimate disposition, however, was to adopt a new Rule with the same defect that petitioner identified in the old one and to "affirm the decision of the Ethics Committee to deny [petitioner's] request" for approval of his letter. 726 S.W. 2d 299, 301 (1987). Petitioner surely cannot be said to have prevailed below.

Nor does the fact that petitioner never leveled his constitutional challenge specifically against Rule 7.3 mean that this case presents "federal constitutional issues [that were] raised here for the first time on review of [a] state court decisio[n]," *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). The parties briefed and argued the constitutionality of a categorical ban on targeted, direct-mail advertising, and the court below plainly considered and rejected those arguments as it adopted Model Rule 7.3. See 726 S.W. 2d, at 300.

We also decline respondent's invitation to dismiss this case in order to avoid interference with ongoing state judicial proceedings. See *Younger* v. *Harris*, 401 U.S. 37 (1971). Once the court below rendered its final judgment in this case, there was no longer any pending state judicial proceedings.

II

Lawyer advertising is in the category of constitutionally protected commercial speech. See *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest," *Zauderer, supra*, at 638 (citing *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 556 (1980)). Since state regulation of commercial speech "may extend only as far as the interest it serves," *Central Hudson, supra*, at 565, state rules that are designed to prevent the "potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the" perceived evil. *In re R. M. J.*, 455 U. S. 191, 203 (1982).

In *Zauderer*, application of these principles required that we strike an Ohio rule that categorically prohibited solicitation of legal employment for pecuniary gain through advertisements containing information or advice, even if truthful and nondeceptive, regarding a specific legal problem. We distinguished written advertisements containing such information or advice from in-person solicitation by lawyers for profit, which we held in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), a State may categorically ban. The "unique features of in-person solicitation by lawyers [that] justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain." we observed, are "not present" in the context of written advertisements. *Zauderer*, 471 U. S., at 641-642.

Our lawyer advertising cases have never distinguished among various modes of written advertising to the general

public. See, *e. g.*, *Bates*, *supra* (newspaper advertising); *id.*, at 372, n. 26 (equating advertising in telephone directory with newspaper advertising); *In re R. M. J.*, *supra* (mailed announcement cards treated same as newspaper and telephone directory advertisements). Thus, Ohio could no more prevent Zauderer from mass-mailing to a general population his offer to represent women injured by the Dalkon Shield than it could prohibit his publication of the advertisement in local newspapers. Similarly, if petitioner's letter is neither false nor deceptive, Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query, "Is your home being foreclosed on?," rather than his observation to the targeted individuals that "It has come to my attention that your home is being foreclosed on." The drafters of Rule 7.3 apparently appreciated as much, for the Rule exempts from the ban "letters addressed or advertising circulars distributed generally to persons . . . who are so situated that they might in general find such services useful."

The court below disapproved petitioner's proposed letter solely because it targeted only persons who were "known to need [the] legal services" offered in his letter, 726 S. W. 2d, at 301, rather than the broader group of persons "so situated that they might in general find such services useful." Generally, unless the advertiser is inept, the latter group would include members of the former. The only reason to disseminate an advertisement of particular legal services among those persons who are "so situated that they might in general find such services useful" is to reach individuals who *actually* "need legal services of the kind provided [and advertised] by the lawyer." But the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail

it only to those whom it would most interest is somehow inherently objectionable.

The court below did not rely on any such theory. See also Brief for Respondent 37 (conceding that "targeted direct mail *advertising*"—as distinguished from "*solicitation*"—"is constitutionally protected") (emphasis in original). Rather, it concluded that the State's blanket ban on all targeted, direct-mail solicitation was permissible because of the "serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." 726 S. W. 2d, at 301. By analogy to *Ohralik*, the court observed:

> "Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation." 726 S. W. 2d, at 301.

Of course, a particular potential client will feel equally "overwhelmed" by his legal troubles and will have the same "impaired capacity for good judgment" regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement—concededly constitutionally protected activities—or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility. Cf. *Ohralik, supra*, at 470 (MARSHALL, J., concurring in part and concurring in judgment) ("What is objectionable about

Ohralik's behavior here is not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it").

Thus, Respondent's facile, suggestion that this case is merely "*Ohralik* in writing" misses the mark. Brief for Respondent 10. In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference. Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud," *Zauderer, supra*, at 641. See *Ohralik, supra,* at 457-458, 464-465. Second, "unique . . . difficulties," *Zauderer, supra,* at 641, would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is "not visible or otherwise open to public scrutiny." *Ohralik*, 436 U. S., at 466. See also *ibid.* ("[I]n-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession")(footnote omitted). Targeted, direct-mail solicitation is distinguishable from the in-person solicitation in each respect.

Like print advertising, petitioner's letter—and targeted, direct-mail solicitation generally—"poses much less risk of overreaching or undue influence" than does in-person solicitation, *Zauderer*, 471 U. S., at 642. Neither mode of written communication involves "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation." *Ibid.* Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement . . . can 'effectively avoid further bombardment of [his]

sensibilities simply by averting [his] eyes,' " *Ohralik*, *supra*, at 465, n. 25 (quoting *Cohen* v. *California*, 403 U.S. 15, 21 (1971)). A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." *Zauderer*, *supra*, at 642. Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is. See Brief for ABA as *Amicus Curiae* 9. Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice. See, *e. g.*, *Leoni* v. *State Bar of California*, 39 Cal. 3d 609, 619-620, 704 P. 2d 183, 189 (1985), summarily dism'd, 475 U.S. 1001 (1986).

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. See *In re R. M. J.*, 455 U.S., at 203. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, *id.*, at 206, giving the

State ample opportunity to supervise mailings and penalize actual abuses. The "regulatory difficulties" that are "unique" to in-person lawyer solicitation, *Zauderer, supra,* at 641—solicitation that is "not visible or otherwise open to public scrutiny" and for which it is "difficult or impossible to obtain reliable proof of what actually took place," *Ohralik, supra,* at 466—do not apply to written solicitations. The court below offered no basis for its "belie[f] [that] submission of a blank form letter to the Advertising Commission [does not] provid[e] a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." 726 S. W. 2d, at 301. Its concerns were presumably those expressed by the ABA House of Delegates in its comment to Rule 7.3:

> "State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading." ABA, Model Rules of Professional Conduct, pp. 93-94 (1984).

The record before us furnishes no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements. See *Bates,* 433 U.S., at 379; *id.,* at 387 (Burger, C. J., concurring in part and dissenting in part) (objecting to "enormous new regulatory burdens called for by" *Bates*). As a general matter, evaluating a targeted advertisement does not require specific information about the recipient's identity and legal problems any more than evaluating a newspaper advertisement requires like information about all

readers. If the targeted letter specifies facts that relate to particular recipients (*e. g.*, "It has come to my attention that your home is being foreclosed on"), the reviewing agency has innumerable options to minimize mistakes. It might, for example, require the lawyer to prove the truth of the fact stated (by supplying copies of the court documents or material that lead the lawyer to the fact); it could require the lawyer to explain briefly how she discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement, see *id.*, at 384 (dictum); *In re R. M. J.*, *supra*, at 206, n. 20, or directing the recipient how to report inaccurate or misleading letters. To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But "[o]ur recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, *supra*, at 646.

III

The validity of Rule 7.3 does not turn on whether petitioner's letter itself exhibited any of the evils at which Rule 7.3 was directed. See *Ohralik*, 436 U.S. at 463-464, 466. Since, however, the First Amendment overbreadth doctrine does not apply to professional advertising, see *Bates*, *supra*, at 379-381, we address respondent's contentions that petitioner's letter is particularly overreaching, and therefore unworthy of First Amendment protection. *Id.*, at 381. In that regard, respondent identifies two features of the letter before us that, in its view, coalesce to convert the proposed letter into "high pressure solicitation, overbearing solicitation," Brief for Respondent 20, which is not protected. First, respondent asserts that the letter's liberal use of un-

derscored, uppercase letters (*e. g.*, "Call *NOW*, don't wait"; "it is *FREE*, there is *NO* charge for calling") "fairly shouts at the recipient . . . that he should employ Shapero." *Id.*, at 19. See also Brief in Opposition 11 ("Letters of solicitation which shout commands to the individual, targeted recipient in words in underscored capitals are of a different order from advertising and are subject to proscription"). Second, respondent objects that the letter contains assertions (*e. g.*, "It may surprise you what I may be able to do for you") that "stat[e] no affirmative or objective fact," but constitute "pure salesman puffery, enticement for the unsophisticated, which commits Shapero to nothing." Brief for Respondent 20.

The pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type. But a truthful and non-deceptive letter, no matter how big its type and how much it speculates can never "shou[t] at the recipient" or "gras[p] him by the lapels," *id.*, at 19, as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching. And so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive," unless the State "assert[s] a substantial interest" that such a restriction would directly advance. *In re R. M. J.*, 455 U.S., at 203. Nor may a State impose a more particularized restriction without a similar showing.

Aside from the interests that we have already rejected, respondent offers none.

To be sure, a letter may be misleading if it unduly emphasizes trivial or "relatively uninformative fact[s]," *In re R. M. J., supra,* at 205 (lawyer's statement, "in large capital letters, that he was a member of the Bar to the Supreme Court of the United States"), or offers overblown assurances of client satisfaction, cf. *In re Von Wiegen,* 63 N. Y. 2d 163, 179, 470 N. E. 2d 838, 847 (1984) (solicitation letter to victims of massive disaster informs them that "it is [the lawyer's] opinion that the liability of the defendants is clear"), cert. denied, 472 U.S. 1007 (1985); *Bates, supra,* at 383-384 ("advertising claims as to the quality of legal services . . . may be so likely to be misleading as to warrant restriction"). Respondent does not argue before us that petitioner's letter was misleading in those respects. Nor does respondent contend that the letter is false or misleading in any other respect. Of course, respondent is free to raise, and the Kentucky courts are free to consider, any such argument on remand.

The judgment of the Supreme Court of Kentucky is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 87-16

RICHARD D. SHAPERO, PETITIONER *v.* KENTUCKY BAR ASSOCIATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[June 13, 1988]

JUSTICE WHITE, with whom JUSTICE STEVENS joins, concurring and dissenting in part.

I agree with Parts I and II of the Court's opinion, but am of the view that the matters addressed in Part III should be left to the state courts in the first instance.

SUPREME COURT OF THE UNITED STATES

No. 87-16

RICHARD D. SHAPERO, PETITIONER *v.* KENTUCKY BAR ASSOCIATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[June 13, 1988]

JUSTICE O'CONNOR, with whom CHIEF JUSTICE REHNQUIST and JUSTICE SCALIA join, dissenting.

Relying primarily on *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), the Court holds that States may not prohibit a form of attorney advertising that is potentially more pernicious than the advertising at issue in that case. I agree with the Court that the reasoning in *Zauderer* supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so destructive that I believe the analytical framework itself should now be reexamined.

I

Zauderer held that the First Amendment was violated by a state rule that forbade attorneys to solicit or accept

employment through advertisements containing information or advice regarding a specific legal problem. See *id.*, at 639-647. I dissented from this holding because I believed that our precedents permitted, and good judgment required, that we give greater deference to the States' legitimate efforts to regulate advertising by their attorneys. Emphasizing the important differences between professional services and standardized consumer products, I concluded that unsolicited legal advice was not analogous to the free samples that are often used to promote sales in other contexts. First, the quality of legal services is typically more difficult for most laypersons to evaluate, and the consequences of a mistaken evaluation of the "free sample" may be much more serious. For that reason, the practice of offering unsolicited legal advice as a means of enticing potential clients into a professional relationship is much more likely to be misleading than superficially similar practices in the sale of ordinary consumer goods. Second, and more important, an attorney has an obligation to provide clients with complete and disinterested advice. The advice contained in unsolicited "free samples" is likely to be colored by the lawyer's own interest in drumming up business, a result that is sure to undermine the professional standards that States have a substantial interest in maintaining.

Zauderer dealt specifically with a newspaper advertisement. Today's decision—which invalidates a similar rule against targeted, direct-mail advertising—wraps the protective mantle of the Constitution around practices that have even more potential for abuse. First, a personalized letter is somewhat more likely "to overpower the will and judgment of laypeople who have not sought [the lawyer's] advice." *Zauderer*, *supra*, at 678 (O'Connor, J., concurring in part, concurring in judgment in part, and dissenting in part). For people whose formal contacts with the legal

system are infrequent, the authority of the law itself may tend to cling to attorneys just as it does to police officers. Unsophisticated citizens, understandably intimidated by the courts and its officers, may therefore find it much more difficult to ignore an apparently "personalized" letter from an attorney than to ignore a general advertisement.

Second, "personalized" form letters are designed to suggest that the sender has some significant personal knowledge about, and concern for, the recipient. Such letters are reasonably transparent when they come from somebody selling consumer goods or stock market tips, but they may be much more misleading when the sender belongs to a profession whose members are ethically obliged to put their clients' interests ahead of their own.

Third, targeted mailings are more likely than general advertisements to contain advice that is unduly tailored to serve the pecuniary interests of the lawyer. Even if such mailings are reviewed in advance by a regulator, they will rarely be seen by the bar in general. Thus, the lawyer's professional colleagues will not have the chance to observe how the desire to sell oneself to potential customers has been balanced against the duty to provide objective legal advice. An attorney's concern with maintaining a good reputation in the professional community, which may in part be motivated by long-term pecuniary interests, will therefore provide less discipline in this context than in the case of general advertising.

Although I think that the regulation at issue today is even more easily defended than the one at issue in *Zauderer*, I agree that the rationale for that decision may fairly be extended to cover today's case. Targeted direct-mail advertisements—like general advertisements but unlike the kind of in-person solicitation that may be banned under *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978)—can at least theoretically be regulated by the States through

prescreening mechanisms. In-person solicitation, moreover, is inherently more prone to abuse than almost any form of written communication. *Zauderer* concluded that the decision in *Ohralik* was limited by these "unique features" of in-person solicitation, see 471 U.S., at 641, and today's majority simply applies the logic of that interpretation of *Ohralik* to the case before us.

II

Attorney advertising generally falls under the rubric of "commercial speech." Political speech, we have often noted, is at the core of the First Amendment. See, *e.g.*, *Boos* v. *Barry*, 485 U.S. ___, ___ (1988). One reason for the special status of political speech was suggested in a metaphor that has become almost as familiar as the principle that it sought to justify: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Cf., *e.g.*, *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. ___, ___ (1988). Traditionally, the constitutional fence around this metaphorical marketplace of ideas had not shielded the actual marketplace of purely commercial transactions from governmental regulation.

In *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), however, the Court concluded that the First Amendment protects the communication of the following so-called "idea": "I will sell you the X prescription drug at the Y price." See *id.*, at 761. The Court argued that the public interest requires that private

economic decisions be well-informed, and it suggested that no satisfactory line could be drawn between ideas about public affairs and information relevant to such private decisions. *Id.*, at 762-765. The dissent observed that the majority had overstated the difficulties of distinguishing public affairs from such matters as the "decision . . . to purchase one or another kind of shampoo." *Id.*, at 787 (REHNQUIST, J., dissenting). The dissent also foresaw that the logic of *Virginia Pharmacy* would almost necessarily extend to advertising by physicians and attorneys. *Id.*, at 785. This prediction soon proved correct, see *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and subsequent decisions have radically curtailed the power of the States to forbid conduct that I believe "promote[s] distrust of lawyers and disrespect for our own system of justice." *Id.*, at 394 (Powell, J., concurring in part and dissenting in part).

The latest developments, in *Zauderer* and now today, confirm that the Court should apply its commercial speech doctrine with more discernment that it has shown in these cases. Decisions subsequent to *Virginia Pharmacy* and *Bates, supra*, moreover, support the use of restraint in applying this doctrine to attorney advertising. We have never held, for example, that commercial speech has the same constitutional status as speech on matters of public policy, and the Court has consistently purported to review laws regulating commercial speech under a significantly more deferential standard of review.

> "Expression concerning purely commercial transactions has come within the ambit of the [First] Amendment's protection only recently. . . . To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of

> speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik* v. *Ohio State Bar Assn., supra,* at 455-456 (footnote omitted).

A standardized legal test has been devised for commercial speech cases. Under that test, such speech is entitled to constitutional protection only if it concerns lawful activities and is not misleading; if the speech is protected, government may still ban or regulate it by laws that directly advance a substantial governmental interest and are appropriately tailored to that purpose. See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York,* 447 U.S. 557, 566 (1980). Applying that test to attorney advertising, it is clear to me that the States should have considerable latitude to ban advertising that that is "*potentially* or demonstrably misleading," *In re R. M. J.,* 455 U.S. 191, 202 (1982) (emphasis added), *as well as* truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession.

Some forms of advertising by lawyers might be protected under this test. Announcing the price of an initial consultation might qualify, for example, especially if appropriate disclaimers about the costs of other services were included. Even here, the inherent difficulties of policing such advertising suggest that we should hesitate to interfere with state rules designed to ensure that adequate disclaimers are included and that such advertisements are suitably restrained.

As soon as one steps into the realm of prices for "routine" legal services such as uncontested divorces and personal bankruptcies, however, it is quite clear to me that the States may ban such advertising completely. The contrary decision in *Bates* was in my view inconsistent with the standard test that is now applied in commercial speech cases. Until one becomes familiar with a client's particular problems, there is simply no way to know that one is dealing with a "routine" divorce or bankruptcy. Such an advertisement is therefore inherently misleading if it fails to inform potential clients that they are not necessarily qualified to decide whether their own apparently simple problems can be handled by "routine" legal services. Furthermore, such advertising practices will undermine professional standards if the attorney accepts the economic risks of offering fixed rates for solving apparently simple problems that will sometimes prove not to be so simple after all. For a lawyer to promise the world that such matters as uncontested divorces can be handled for a flat fee will inevitably create incentives to ignore (or avoid discovering) the complexities that would lead a conscientious attorney to treat some clients' cases as anything but routine. It may be possible to devise workable rules that would allow something more than the most minimal kinds of price advertising by attorneys. That task, however, is properly left to the States, and it is certainly not a fit subject for constitutional adjudication. Under the *Central Hudson* test, government has more than ample justification for banning or strictly regulating most forms of price advertising.

Solicitation practices like the "free sample" techniques approved by *Zauderer* and today's decision are even less deserving of constitutional protection than price advertising for supposedly routine legal services. Applying the *Central Hudson* test to the regulation at issue today, for example, I think it clear that Kentucky has a substantial in-

terest in preventing the potentially misleading effects of targeted, direct-mail advertising as well as the corrosive effects that such advertising can have on appropriate professional standards. Soliciting business from strangers who appear to need particular legal services, when a significant motive for the offer is the lawyer's pecuniary gain, always has a tendency to corrupt the solicitor's professional judgment. This is especially true when the solicitation includes the offer of a "free sample," as petitioner's proposed letter does. I therefore conclude that American Bar Association Model Rule of Professional Conduct 7.3 (1984) sweeps no more broadly than is necessary to advance a substantial governmental interest. See *Central Hudson, supra*, at 566. The Kentucky Supreme Court correctly found that petitioner's letter could permissbly be banned under Rule 7.3, and I dissent from the Court's decision to reverse that judgment.

III

The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations. In *Bates*, for example, the majority appeared to demand conclusive proof that the country would be better off if the States were allowed to retain a rule that served "to inhibit the free flow of commercial information and to keep the public in ignorance." 433 U.S., at 365. Although the opinion contained extensive discussion of the proffered justifications for restrictions on price advertising, the result was little more than a bare conclusion that "We are not persuaded that price advertising will harm consumers." See *id.*, at 368-379. Dismissing Justice Powell's careful critique of the implicit legislative fact-finding that underlay its analysis, the *Bates* majority simply insisted

on concluding that the benefits of advertising outweigh its dangers. Compare *id.*, at 373, n. 28, with *id.*, at 391-400 (Powell, J., concurring in part and dissenting in part). In my view, that policy decision was not derived from the First Amendment, and it should not have been used to displace a different and no less reasonable policy decision of the State whose regulation was at issue.

Bates was an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its applicaton. Rather than continuing to work out all the consequences of its approach, we should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. The *Central Hudson* test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider *Bates* in the light of that doctrine.

Even if I agreed that this Court should take upon itself the task of deciding what forms of attorney advertising are in the public interest, I would not agree with what it has done. The best arguments in favor of rules permitting attorneys to advertise are founded in elementary economic principles. See, *e.g.*, Hazard, Pearce, & Stempel, Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services, 58 N. Y. U. L. Rev. 1084 (1983). Restrictions on truthful advertising, which artificially interfere with the ability of suppliers to transmit price information to consumers, presumably reduce the efficiency of the mechanisms of supply and demand. Other factors being equal, this should cause or enable suppliers (in this case attorneys) to maintain a price/quality ratio in some of their services that is higher than would otherwise prevail. Although one could probably not test this hypothesis empirically, it is inherently plausible. Nor is it implausible to imagine that one effect of restrictions on lawyer advertis-

ing, and perhaps sometimes an intended effect, is to enable attorneys to charge their clients more for some services (of a given quality) than they would be able to charge absent the restrictions.

Assuming *arguendo* that the removal of advertising restrictions should lead in the short run to increased efficiency in the provision of legal services, I would not agree that we can safely assume the same effect in the long run. The economic argument against these restrictions ignores the delicate role they may play in preserving the norms of the legal profession. While it may be difficult to defend this role with precise economic logic, I believe there is a powerful argument in favor of restricting lawyer advertising and that this argument is at the very least not easily refuted by economic analysis.

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

It is worth recalling why lawyers are regulated at all, or to a greater degree than most other occupations, and why history is littered with failed attempts to extinguish lawyers as a special class. See generally R. Pound, The Lawyer from Antiquity to Modern Times (1953). Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts. This training is one element of what we mean when we refer to the law as a "learned profession." Such knowledge by its nature cannot be made generally available and it therefore confers the power and the temptation to manipulate the system of justice for one's own ends. Such manipulation can occur in at least two obvious ways. One results from overly zealous representation of the client's interests; abuse of the discovery process is one example whose causes and effects (if not its cure) is apparent. The second, and for present purposes the more relevant, problem is abuse of the client for the lawyer's benefit. Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arms-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subject to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it cer-

tainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession. A few examples include the great efforts made during this century to improve the quality and breadth of the legal education that is required for admission to the bar; the concomitant attempt to cultivate a sub-class of genuine scholars within the profession; the development of bar associations that aspire to be more than trade groups; strict disciplinary rules about conflicts of interest and client abandonment; and promotion of the expectation that an attorney's history of voluntary public service is a relevant factor in selecting judicial candidates.

Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other. There is no guarantee, of course, that the restrictions will always have the desired effect, and they are surely not a sufficient means to their proper goal. Given their inevitable anticompetitive effects, moreover, they should not be thoughtlessly retained or insulated from skeptical criticism. Appropriate modifications have been made in the light of reason and experience, and other changes may be suggested in the future.

In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court's recent decisions reflect a myopic belief that "consumers," and thus our nation, will benefit from a constitutional

theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. Compare, *e.g.*, *Bates*, 433 U.S., at 370-372, with *id.*, at 400-401, and n. 11 (Powell, J., concurring in part and dissenting in part). In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-335-KB

RICHARD D. SHAPERO, - - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION, - - - *Respondent*

IN SUPREME COURT

OPINION AND ORDER

Petitioner, Richard D. Shapero, filed a motion in this Court for a briefing schedule on the issues of his right to an award of attorney fees and expenses in this action. This Court has denied the motion for a briefing schedule because the motion and response already provide adequate briefing, and in this Opinion we deny Petitioner's request for the reasons that follow.

The following facts give rise to Petitioner's motion. Using SCR 3.135, Petitioner submitted a proposed letter to the Kentucky Attorneys Advertising Commission for approval. Petitioner planned to send the letter which constituted direct targeted mail advertising to potential clients with a foreclosure suit filed against them. The Advertising Commission found that the proposed letter violated SCR 3.135(b)(i), since withdrawn, which then prohibited a letter "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." After failing to obtain approval from the

Advertising Commission, Petitioner *abandoned* the proceeding although SCR 3.135(8) provided a right to appeal.

He then separately petitioned for an informal advisory opinion from the Committee on Legal Ethics, a procedure provided by SCR 3.530. Instead of just issuing an informal opinion, following the procedure for which the rule provides the Ethics Committee asked the Board of Governors to adopt and issue a formal advisory opinion. The Board of Governors issued formal advisory opinion E-310. Opinion E-310 held that *an* attorney (any attorney) may not write "a letter and send it by regular mail to a specific individual that the lawyer has identified as being in need of the attorney's legal services."

Petitioner next sought review in this Court of the Board's formal advisory opinion, as provided for in SCR 3.530. We granted review and affirmed Ethics Opinion E-310 in substance. Our Opinion also deleted SCR 3.135 (b)(i) and adopted the new model rule, Rule 7.3, from the ABA Model Code of Professional Responsibility. We based our holding on the belief that "submisson of a blank form letter to the Advertising Commission [does not] provide[] a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." *Shapero* v. *Kentucky Bar Ass'n.*, Ky., 726 S.W. 2d 299 (1987).

Our judgment was reversed by the Supreme Court of the United States, with the Kentucky Bar Association being ordered to pay Petitioner $383.21 for his costs. *Shapero* v. *Kentucky Bar Ass'n.*, 486 U.S. __, 100 L. Ed. 2d 475, 108 S.Ct. 1916 (1988).

Petitioner now seeks recovery of attorney fees and expenses incurred in the previously discussed proceedings before the Kentucky Supreme Court and the United States Supreme Court. Petitioner argues that he is entitled to

an award of attorneys fees[1] and expenses under 42 U.S.C. § 1988. Section 1988 allows a court, in its discretion, to award the prevailing party reasonable attorney fees in an action to enforce a provision of 42 U.S.C. § 1983. Section 1983 creates a civil action against persons acting under color of the state law when their actions deprive the plaintiffs of rights secured by the Constitution. Petitioner maintains that a blanket ban on targeted direct mail advertisements violated his constitutional rights under the First and Fourteenth Amendments of the United States Constitution. He argues further that this Court's review of the Advisory Opinion was an action to redress this violation of his civil rights.

Petitioner failed to mention Section 1983 in his Brief to our Court when we reviewed the Board of Governors Advisory Opinion. Petitioner submits that this failure is not fatal to his award of attorney fees and expenses. He relies on *Americans United for Separation of Church and State* v. *School Dist. of Grand Rapids*, 835 F. 2d 627 (6th Cir. 1987), as authority for this position. We need not decide whether to follow this precedent because the present situation is inapposite.

In *Americans United* plaintiffs "were the prevailing parties in an *action to enjoin* programs by which a public school system leased classrooms in buildings of religious nonpublic school associations." *Id.* at 628. The Sixth Cir-

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[1]The attorney fees requested, in the amount of $60,025.00, include hourly rates for paralegals and law clerks. The United States Supreme Court has granted review of *Blanchard* v. *Bergeron*, 831 F. 2d 563 (5th Cir. 1987). One of the issues in *Blanchard* is whether the time of paralegals and law clerks should be considered in an award of reasonable attorney fees under 42 U.S.C. § 1988. Granting review of this issue puts in doubt the recoverability of other expenses under § 1988. Petitioner seeks recovery of other expenses, such as copying and cab fare, in this proceeding.

cuit held that prevailing parties in an action against state authorities to vindicate constitutional rights do not have to specifically plead or rely upon Section 1983 to be entitled to attorney fees under Section 1988.

Petitioner's challenge to Ethics Opinion E-310 differed from *Americans United* in one fatal respect. In *Americans United*, the plaintiffs petitioned for, and obtained, personal redress. Specific action was sought *and* was taken against the defendants. In our Court, Petitioner sought only review of "the attached Opinion of the Kentucky State Bar Association." He did not seek anything more than an opinion from us overruling an ethics opinion. He never appealed denial of his right to send the letter submitted to the Advertising Commission as provided for in SCR 3.135(8). We granted review of an advisory opinion, not review of any action taken against Mr. Shapero. The only action taken against Mr. Shapero was taken by the Advertising Commission. This action was never appealed.

The Advisory Opinion published by the Board of Governors had no legally binding effect on Shapero, before or after we affirmed it. If he had proceeded to mail the letter and disciplinary proceedings had been instituted, and thereafter he had been enjoined or disciplined, then and only then, would action have been taken against him. The effect of the KBA Advisory Opinion, and of our Opinion, was no more binding on Mr. Shapero than on any other member of the Bar.

Our Opinion in *Shapero* v. *Kentucky Bar Ass'n.* erroneously stated that we affirmed the decision of the Ethics Committee in denying the request. We affirmed the Opinion of the Ethics Committee as stated in the Advisory Opinion, but neither the Committee nor this Court denied any request. The Ethics Committee never reviewed Mr. Shapero's request for permission to send the letter. The Ethics Committee had no authority to grant or deny per-

mission to send the proposed letter. Jurisdiction lay in the Advertising Commission. Petitioner received the ruling of the Advertising Commission but chose not to appeal the ruling. SCR 3.135(8) allows "any person aggrieved by a notice of proposed disapproval or a final decision of the [Advertising] Commission" to appeal to the Board of Governors and to appeal the Board's decision to the Kentucky Supreme Court. Petitioner did not select this route. The wording of our Opinion in the *Shapero* case was in error in assuming there was a "request" before us to deny, but this mistake does not create a right where none exists.

Because we decide that this case bears no similarity to a Section 1983 action, it is unnecessary to reach other issues regarding computation of attorneys fees and expenses set forth and discussed in the Motion and Pesponse.

Based on the record in this case, we deny the Petitioner's motion for attorney fees and expenses.

All concur.

ENTERED: January 19, 1989.

(s) Robert F. Stephens
Chief Justice

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TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-335-KB

RICHARD SHAPERO - - - - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - - *Respondent*

IN SUPREME COURT

ORDER

Petitioner has filed a motion styled "Motion for Final Judgment," requesting this Court to take two actions.

First, petitioner moves this Court to enter an Order setting aside so much of our decision in *Shapero* v. *Kentucky Bar Ass'n*, Ky., 726 S.W. 2d 229 (1987), as adopts Model Rule 7.3 "as the law of this Commonwealth." *Id.* at 301. The Opinion of the United States Supreme Court, 486 U.S. —, 100 L. Ed. 2d 475, 108 S. Ct. 1916 (1988), reversing our approval of Ethics Opinion E-310 is the law in this matter. It is both unnecessary and inappropriate for us to take any further action.

Petitioner also requests we approve his targeted direct mail advertisement, or, in the alternative, remand the matter of approval for reconsideration by the Kentucky Attorneys Advertising Commission. The reasons we have not so acted are set out in *Shapero* v. *Kentucky Bar Ass'n*, rendered January 19, 1989. Petitioner sought review in our Court of Ethics Opinion E-310. He did not appeal the Advertising Commission's disapproval of the submitted

letter as provided for in SCR 3.135(8). The issue of approval has never been before this Court. Therefore, approval or remand to the Advertising Commission is inappropriate.

Petitioner Shapero's motion is denied

All concur.

ENTERED: April 6, 1989

(s) Robert F. Stephens
Chief Justice

RENDERED. NOVEMBER 26, 1986
AS MODIFIED MARCH 27, 1987

SUPREME COURT OF KENTUCKY

86-SC-335-KB

RICHARD D. SHAPERO, - - - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION, - - - *Respondent*

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

AFFIRMING

This is a petition for review of Supreme Court Rule 3.135(5)(b)(i) which has been interpreted by the advertising commission to prohibit direct targeted mail advertising by lawers.

The question is whether the rule violates the First and Fourteenth Amendments to the United States Constitution.

Shapero argues that the targeted direct mail advertising rule does not advance a substantial governmental interest and the rule is more restrictive than necessary in view of the holding of the United States Supreme Court in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. —, 85 L. Ed. 2d 652, 670, 105 S. Ct. — (1985).

Supreme Court Rule 3.135(5)(b)(i) provides:

> A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time,

and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

In 1985, the United States Supreme Court in a plurality decision ruled that an attorney may not be disciplined for soliciting legal business through printed newspaper advertisements which contained truthful and nondeceptive information and advice regarding the legal rights of potential clients. *Zauderer, supra.*

Following the *Zauderer* decision, Shapero, a Louisville attorney, pursuant to SCR 3.135(6)(b), submitted to the Lawyers' Advertising Commission of the Kentucky State Bar Association, the blank form of a letter he proposed to send to potential clients who had a foreclosure suit filed against them. The advertising commission determined that the letter proposed is a violation of SCR 3.135(5)(b)(i) because it is a letter precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public. The advertising commission did not find that the letter was false, misleading or deceptive. Thereafter, Shapero requested an opinion from the Ethics Committee of the Kentucky Bar Association about propriety of the proposed letter. The Ethics Committee disapproved the submitted form of direct-mail letter. Shapero then petitioned this Court for review of the Advisory Opinion and the rule which was granted.

The rule as now written which was interpreted by the Advertising Commission and the Ethics Committee to be in conflict with the interpretation of the United States Supreme Court of the First and Fourteenth Amendments to the United States Constitution as expressed in *Zauderer* should be deleted.

In that case, the United States Supreme Court determined that lawyer advertising is a form of commercial free speech protected by the First Amendment and that advertising by attorneys may not be subjected to blanket suppression. The specific cases involved newspaper advertising; this case involves direct targeted mail.

In re R.M.J., 455 U.S. 191, 71 L. Ed. 2d 64, 102 S. Ct. 929 (1982), quoting *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977) holds that while misleading advertising may be prohibited entirely, the states may not place an absolute prohibition on certain types of potentially misleading information if the information also may be presented in a way that is not deceptive. The state may exercise its authority to regulate legal advertising only when it can assert a substantial interest and the interference with commercial free speech must be in proportion to the interests served. *In re R.M.J., supra.* The United States Supreme Court has struck down bans on legal advertising that include targeted direct mail advertising for nonpecuniary reasons. *See In re Primus*, 436 U. S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978).

The Ethics Committee cited Rule 7.3 of the Model Rules of Professional Conduct which were adopted by the American Bar Association several years before the United States Supreme Court's decision in *Zauderer* which prohibits solicitation for pecuniary gain. However, the Kentucky Ethics Committee did not determine that the proposed blank-form letter was misleading, potentially misleading, deceptive or false. The Model Rules have been proposed in Kentucky but never formally adopted.

The crux of the matter is whether the state has a substantial governmental interest that is directly served by prohibiting solicitation by direct targeted mailing sent to potential clients known to have a specific legal problem and

whether the targeted direct mail may be prohibited because it is improper solicitation and the rule is in proportion to the governmental interest served.

In view of the language of the rule as it is presently written, we are compelled by the decision in *Zauderer* to order the rule deleted.

It is the decision of this Court that Supreme Court Rule 3.135(5)(b)(i) be deleted.

The state is free to fashion any reasonable restriction with respect to time, place and manner of solicitation by the members of its bar association. *In re Primus, supra.* The state has a recognizable governmental interest in regulating members of the professions it licenses and who serve as officers of the courts which justifies the application of rules to prohibit solicitation that is misleading, overbearing or involves other features of deception or improper influence. A state may forbid in-person solicitation for pecuniary gain under circumstances likely to result in those evils. *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978). Direct targeted mail to a person with whom the lawyer has no prior relationship should also be prohibited for the same reasons.

Ohralik, supra, held that the in-person solicitation of business by a lawyer was so fraught with potential for wrongdoing and so difficult to police that it justified the establishment of a prophylactic measure preventing it. The courts have recognized the difference between the protection of commercial free speech which occurs in an area traditionally subject to governmental regulation and other varieties of speech where the same types of regulations might be improper.

Ohralik specifically found that the free speech element is an essential but subordinate component of a situation

of in-person solicitation by a lawyer of a potential client. We agree.

This Court is not unmindful of the serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services. Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation.

As provided in the Model Rules which are now under consideration by this Court and members of the Kentucky Bar Association, as well as current rules, advertising makes it possible for a potential client to be informed about the need for legal services and about the qualifications of available lawyers without subjecting them to direct personal pressure. The use of general advertising as distinguished from direct private contact tends to assure that information is presented without intimidation.

We do not believe submission of a blank form letter to the Advertising Commission provides a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation.

Such dangers result from direct solicitation whether in person or by mail. General mailings not addressed to a specific situation do not have the same danger for abuse as direct targeted mailing.

The model rule, *Rule 7.3*, which is proposed for adoption in Kentucky provides as follows:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has

> no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

This is an appropriate rule which we adopt as the law of this Commonwealth.

We affirm the decision of the Ethics Committee to deny the request.

Stephens, C.J., and Gant, Lambert, Leibson, Stephenson, and Wintersheimer, JJ., concur.
Vance, J., dissents.

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No. 88- (2)

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD D. SHAPERO - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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37pp

QUESTIONS PRESENTED

1. Did the Supreme Court of Kentucky correctly rule that attorneys' fees and expenses were not properly recoverable under 42 U.S.C. §1988 in this proceeding for judicial review of an administrative ruling as to the ethics of a lawyer using a targeted direct letter of solicitation of employment in violation of a rule of the Supreme Court of Kentucky, Petitioner Shapero now having pending an action in the United States District Court for the Western District of Kentucky under 42 U.S.C. §1983 in which he specifically seeks recovery of such fees and expenses?

2. Did the Supreme Court of Kentucky correctly rule that there was no letter before the Court to remand to the Advertising Commission for consideration, Petitioner Shapero having abandoned his right to appeal the ruling of the Advertising Commission disapproving his proposed letter of solicitation and having chosen instead to seek an ethics ruling in a separate proceeding?

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No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD D. SHAPERO - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Kentucky Bar Association, respectfully requests that this Court deny Petitioner Shapero's Petition for Certiorari seeking review of (1) the Opinion and Order of the Supreme Court of Kentucky entered January 19, 1989 and reported at 763 S. W. 2d 126 (Ky. 1989), reproduced in the Appendix to the Petition for Certiorari and referred to by Petitioner Shapero as "*Shapero II*", and (2) the Order of said Court entered April 6, 1989 and ordered by the Court to be published but which has not yet been published, also reproduced in the Appendix to the Petition and referred to by Petitioner Shapero as "*Shapero III*".

STATEMENT OF THE CASE

Respondent, Kentucky Bar Association (herein sometimes called "KBA"), does not accept the statement of the case given by Petitioner Shapero (herein sometimes called "Shapero") but sets forth its own statement below.

Petitioner Shapero attacked the Kentucky Supreme Court's prohibition against targeted direct mail solicitation of employment by lawyers by initiating *three* separate proceedings concerning the same subject matter. One of these proceedings is an action in the United States District Court for the Western District of Kentucky under 42 U.S.C. §1983 for violation of his civil rights. A copy of Petitioner's Amended Complaint in that action is reproduced in the Appendix to this Brief at pp. 1a-8a. In that action, Shapero seeks to recover attorneys' fees under 42 U.S.C. §1988. The important point which we wish to make at the outset is that the proceeding now before this Court is *not* a §1983 action. We describe below the three divergent paths which Shapero has followed in his attack upon the Supreme Court of Kentucky's rule against targeted direct mail solicitation of employment for pecuniary gain.

The first proceeding Shapero initiated was an application to the Kentucky Attorneys Advertising Commission dated July 12, 1985, for approval of a letter of solicitation which he proposed to send to persons against whom foreclosure proceedings had been instituted. The Advertising Commission, in a decision

dated September 19, 1988, found that the proposed letter was in violation of Kentucky Supreme Court Rule (hereinafter "S.C.R.") 3.135(5). The Commission said the proposed letter "is not approved". See the Commission's opinion, included in the Appendix to this Brief at pp. 9a-13a. Under S.C.R. 3.135(8), Shapero had the right to appeal the Advertising Commission's ruling to the Board of Governors of the KBA. If Petitioner felt aggrieved by the ruling of the Board of Governors, the same rule gave him the right to seek further review by the Supreme Court of Kentucky. However, Petitioner did not exercise these rights of appeal; instead, he *abandoned* this proceeding.[1]

Rather than appealing the ruling of the Advertising Commission, Petitioner started off on his second path, and requested an Advisory Opinion from the Committee on Legal Ethics as to the propriety of his proposed letter of solicitation—the same letter which the Advertising Commission had already disapproved. S.C.R. 3.530 provides that the Ethics Committee may furnish a written informal opinion or may request the Board of Governors of the KBA to pass upon the question. The Board may then issue a formal opinion, in which three-fourths of the members of the Board must concur. In the case at bar, the Board of Governors issued Advisory Opinion E-310 in 1986. A copy of

[1]This is not the first time this case has been before this Court. A more detailed discussion of the history of this litigation may be found in the Respondent's Brief filed in the previous Supreme Court action between the parties, *Shapero* v. *Kentucky Bar Association*, No. 87-16.

that Opinion is reproduced in the Appendix to this Brief at pp. 14a-15a. Opinion E-310 addressed not only Shapero's inquiry about his proposed targeted direct letter of solicitation concerning foreclosures, but also the issue of the use of targeted direct mail advertising to potential tort plaintiffs. In other words, the opinion was broader than the issue raised by Shapero.

On April 29, 1986, Shapero sought review of Opinion E-310 in the Supreme Court of Kentucky. Review was granted, the questions were fully briefed, and oral argument was heard. On November 26, 1986, the Supreme Court of Kentucky handed down its opinion affirming Advisory Opinion E-310 of the Board of Governors. A copy of the Supreme Court of Kentucky's Opinion, referred to by Petitioner as "Shapero I", is included in Petitioner's Appendix to his Petition, and is also reported in 726 S. W. 2d 299. Petitioner thereafter filed his Petition for Certiorari in this Court in No. 87-16.

It is important to note that in seeking the advisory ruling and in appealing that ruling to the Supreme Court of Kentucky, Petitioner Shapero *did not* seek permission to send his proposed letter, for the very good reason that the Ethics Committee had no jurisdiction to grant or deny such permission. Such jurisdiction lay in the Advertising Commission, and Petitioner Shapero had already received its adverse ruling and had abandoned that proceeding.

On May 21, 1987, Petitioner Shapero set out upon his third path when he served an amended complaint[2] in an action filed in the United States District Court for the Western District of Kentucky at Louisville, Civil Action No. 83-0129-L(B). Appendix pp. 1a-8a. In that amended complaint, relying upon 42 U.S.C. §1983, Petitioner alleged that S.C.R. 3.135 (the advertising rule) violated his constitutional rights. Petitioner sought injunctive relief against the rule and its enforcement; a declaration that the adoption and implementation of the rule violated his constitutional rights; damages; and reasonable attorneys' fees. That action is still pending. In July, 1988, Shapero renewed his motion for preliminary injunction and for partial summary judgment.

In the meantime, on June 13, 1988, this Court handed down its Opinion in No. 87-16, reversing the Supreme Court of Kentucky and remanding the case for further proceedings. *Shapero* v. *Kentucky Bar Association*, 486 U.S. —, 100 L. Ed. 2d 475, 108 S. Ct. 1916 (1988). Subsequently, various pleadings were filed by both parties in the Kentucky Supreme Court. On October 4, 1988, Petitioner Shapero filed a motion for attorneys' fees of $60,025.00 and expenses of $9,186.35. The Respondent opposed the motion by its response served October 27, 1988, and Shapero replied on November 22, 1988. The Supreme Court of Kentucky, by its Opinion and Order entered January 19,

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[2]Petitioner filed his original Federal District Court Complaint in 1983.

1989, denied the motion. Petitioner Shapero refers to this Opinion and Order as "*Shapero II*"; it is reproduced in his Appendix to the Petition for Certiorari. It is this ruling which is the subject of the current Petition for Certiorari.

On February 16, 1989, Petitioner Shapero served in the Supreme Court of Kentucky a "motion for final judgment", asserting that there was still before the Court the question of the appropriate disposition of the opinion of the Supreme Court of Kentucky in *Shapero I*, "and the question of the propriety of the advertisement submitted by Richard Shapero". Respondent KBA filed its response on February 24, 1989, arguing that the mandate of this Court, having been filed in the Supreme Court of Kentucky, was self-executing and that the American Bar Association Model Rule of Professional Conduct 7.3 was no longer in effect *to the extent that* this Court found it to be inappropriate. Respondent KBA further argued that Shapero's proposed letter of solicitation was not before the Court and could not be remanded to the Advertising Commission, because Shapero did not appeal from the ruling of the Advertising Commission refusing to approve the letter. Respondent argued that Shapero must submit his letter to the Advertising Commission anew and that if this is done Shapero might find the ruling of the Commission to be satisfactory; hence, that it would be improvident for the Supreme Court of Kentucky to make a ruling about the Shapero solicitation letter because, if proper pro-

cedure is followed and the matter is presented to the Advertising Commission, the letter may be approved and the question may never be presented to the Supreme Court of Kentucky.

On April 6, 1989, the Supreme Court of Kentucky entered an Order denying Shapero's motion for final judgment. Petitioner refers to this Order as "*Shapero III*" and it is reproduced in the Appendix to his Petition for Certiorari.

REASONS FOR DENYING THE WRIT

1. The First Question Presented By Petitioner Shapero Is A Sham; The Supreme Court of Kentucky Did Not Amend Findings Which Were The Basis For Its Decision Which Was Reversed By The Supreme Court Of The United States.

Petitioner Shapero claims that the Kentucky Supreme Court amended the findings upon which this Court relied in *Shapero* v. *Kentucky Bar Association*, 486 U.S. ___, and then used those amended findings to deny Petitioner's request for attorneys' fees. Petitioner's entire argument under his first question is based upon the last sentence of the Supreme Court of Kentucky in *Shapero I:* "We affirm the decision of the Ethics Committee to deny the request." 726 S. W. 2d at 301. In its opinion and order entered in *Shapero II*, the Supreme Court of Kentucky stated that its opinion in *Shapero I* "erroneously stated that we affirmed the decision of the Ethics Committee in denying the request". 763 S. W. 2d 126, 128 (1989). The Court went on to explain that in *Shapero I* it

affirmed the opinion of the Ethics Committee that targeted direct mailings violate the Kentucky ethical rules, but that "neither the Committee nor this Court denied any request [to mail a particular letter]". *Id.* The Court explained:

> The Ethics Committee never reviewed Mr. Shapero's request for permission to send the letter. The Ethics Committee had no authority to grant or deny permission to send the proposed letter. Jurisdiction lay in the Advertising Commission. Petitioner received the ruling of the Advertising Commission, but chose not to appeal the ruling. . . . The wording of our Opinion in the *Shapero* case was in error in assuming there was a "request" before us to deny, but this mistake does not create a right where none exists.

Id.

The Supreme Court of Kentucky simply misspoke itself in the last sentence of its opinion in *Shapero I*. That error in language, however, did not alter the issue before the Court or its ruling. It is not uncommon for appellate courts, with the heavy burdens they carry, to misspeak themselves in their opinions about non-essential or peripheral matters, but such errors do not affect or invalidate the essential rulings of the courts. For example, this Court misspoke itself no fewer than three times in its majority opinion of June 13, 1988 in this case: first on page four of the Slip Opinion in referring to the Respondent when the Petitioner was meant, second on page seven in misstating a comparison made in Respondent's Brief, and third

on page twelve in misquoting an extract from its opinion in the *R.M.J.* case. None of these errors affected this Court's essential ruling that a State may not categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems. In the same way, the erroneous reference to a "request" in the last sentence of the opinion in *Shapero I* in no way affected the Kentucky Court's essential ruling, which was to affirm the Advisory Opinion of the Ethics Committee.

Grasping the inadvertent use of the word "request", Shapero claims that he "believed that the Supreme Court of Kentucky had denied his request to mail the letter in issue". (Petition, p. 8). Shapero is bound to know that this statement is not true, for he knows that his request for approval of the letter was addressed by him to the Advertising Commission and when that Commission ruled against him, he did not appeal its ruling. The issue before the Supreme Court of Kentucky was not whether to grant or deny permission to Shapero to send the letter. The issue was whether as a matter of ethics an attorney (any attorney, not Shapero alone) could send a letter of solicitation to potential tort plaintiffs, victims of foreclosure and others. See generally, Advisory Opinion E-310, Appendix pp. 14a-15a.

Shapero's reliance (Petition, pp. 11-14) upon authorities dealing with the supremacy of this Court over inferior courts is an empty exercise since no one, least

of all the Respondent KBA, questions that doctrine. The ruling of the Supreme Court of Kentucky in *Shapero II* turned not on the "request" issue, but upon the fact that Shapero "did not seek anything more than an opinion from us overruling an ethics opinion". 763 S. W. 2d at 128. The Court also stated with the utmost correctness that it "granted review of an advisory opinion, not review of any action taken against Mr. Shapero". *Id.* Such being true, the Court concluded, correctly, that the proceeding before it was not one to which §1988 applies.

2. The Kentucky Supreme Court Correctly Ruled That Petitioner Shapero Is Not Entitled To Recover Attorneys' Fees Under 42 U.S.C. §1988.

Regardless of how one characterizes the Kentucky Supreme Court's decision in *Shapero II,* the Court correctly concluded that Shapero was not entitled to recover attorneys' fees under 42 U.S.C. §1988 in this proceeding. The primary reason why Petitioner is not entitled to recover such fees in this proceeding is because he "failed to mention §1983 in his Brief to [the Kentucky Supreme Court] when [it] reviewed the Board of Governors Advisory Opinion". *Shapero II,* 763 S. W. 2d at 127. His appeal was based solely on the Opinion rendered by the Ethics Committee, and not upon any violation of his civil rights.

The Supreme Court of Kentucky correctly held in *Shapero II* that Petitioner "did not seek anything more than an opinion from us overruling an advisory opinion". 763 S. W. 2d at 128. He did not seek per-

sonal redress. The Court went on to point out that Advisory Opinion E-310 "had no legally binding effect on Shapero before or after we affirmed it", and that "if he had proceeded to mail the letter and disciplinary proceedings had been instituted, and thereafter he had been enjoined or disciplined, then and only then would action have been taken against him". *Id.* The Court stated that the effect of the KBA Advisory Opinion, and of its affirming opinion, "was no more binding on Mr. Shapero than on any other member of the bar". *Id.*

The best test of what one seeks in litigation is the prayer of his pleading. In Shapero's motion for review he asked the Supreme Court of Kentucky to review Advisory Opinion E-310 to determine whether the applicable advertising rule was violative of the First and Fourteenth Amendments in view of the holding in the *Zauderer* case, "and to declare this rule void". Just as this prayer sought no redress of any personal action against Shapero, so too Advisory Opinion E-310 was general in nature and dealt not only with Shapero's inquiry about solicitation letters concerning foreclosures but also with inquiries from others about such letters directed to potential tort plaintiffs. The Supreme Court of Kentucky's ruling in *Shapero I* had no binding effect on Petitioner; therefore, it cannot be said that Petitioner was deprived of any of his civil rights as a consequence of the Court's ruling.

Attorneys' fees are recoverable under 42 U.S.C. §1988 only if one prevails in an action to enforce a

provision of 42 U.S.C. §1983, which creates a civil action against persons who act under color of state law to deprive another of rights secured by the Constitution. Petitioner is not entitled to recover attorneys' fees here because this action is not, and cannot be characterized as, a §1983 action.

Shapero's activities in seeking a ruling of the Ethics Committee and in appealing its ruling to the Supreme Court of Kentucky were, at best, administrative proceedings not necessary to the maintenance by him of his action in Federal Court. In such administrative proceedings, attorneys' fees are not recoverable under §1988. *Webb* v. *Dyer County Board of Education,* 471 U.S. 234, 85 L. Ed. 2d 233, 105 S. Ct. 1923 (1985); *North Carolina Department of Transportation* v. *Crest Street Community Council, Inc.,* 479 U.S. 6, 93 L. Ed. 2d 188, 107 S. Ct. 336 (1986). *Accord Blow* v. *Lascaris,* 523 F. Supp. 913 (N.D.N.Y. 1981), *aff'd* 668 F. 2d 670 (2d Cir. 1982), *cert. denied* 459 U.S. 914, L. Ed. 2d 179, 103 S. Ct. 225 (1982).

Texas State Teachers Assn. v. *Garland Independent School District,* 57 U.S.L.W. 4383 (U.S. Mar. 28, 1989), which Petitioner cites, is not on point. That was an action in which summary judgment was entered in a Federal District Court and was not an administrative proceeding. Moreover, this Court stated that "Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis,* a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been

satisfied". *Id.* at 4386. The Court pointed out that in the case before it the petitioners "obtained a judgment vindicating the First Amendment rights of public employees in the workplace". *Id.* Shapero has no similar achievement. He has simply obtained the reversal by this Court of the affirmance of an administrative ethics ruling, which was advisory in nature and not binding on him or anyone else.

Petitioner maintains that he obtained declaratory relief (Petition, p. 19), and that such relief entitles him to an award of attorneys' fees under §1988. This claim is simply not true. The ruling of the Kentucky Supreme Court was *not* a declaratory judgment. Likewise, this Court's finding that the Kentucky Supreme Court erred in affirming Advisory Opinion E-310, was not a declaratory judgment. Thus, Petitioner cannot recover his attorneys' fees based upon his claim that he obtained declaratory relief.

3. Petitioner Has A 42 U.S.C. §1983 Action Pending In Federal District Court Which Precludes The Recovery Of Attorneys' Fees In This Proceeding.

The writ sought should be denied because Petitioner Shapero has a 42 U.S.C. §1983 action pending in the Federal District Court for the Western District of Kentucky. See Appendix pp. 1a-8a. In that action, Petitioner raises similar claims to those made in this case and clearly charges that his (and others) civil rights have been abridged by acts of the Respondent, KBA, in prohibiting targeted direct mail solicitation. Specifically, paragraph three of the prayer of the

Amended Complaint in that action seeks a declaration that the adoption and implementation of S.C.R. 3.135 (5)(b)(i) (prohibiting targeted direct mail solicitation by lawyers for pecuniary gain) violates Petitioner's rights under the First, Fifth and Fourteenth Amendments. However, those claims are made in the District Court action, not in this case.

Furthermore, Petitioner Shapero's §1983 action pending in federal district court seeks recovery of attorneys' fees. He cannot recover on the same subject in both his federal court action and this one. The district court action, by its own allegations, is clearly a §1983 action. Such being so, this one cannot be.

A fundamental rule of fairness in Anglo-American jurisprudence is that a plaintiff cannot split his cause of action into various pieces and pursue at his pleasure and according to his own timetable the pieces thereof which suit him best. In *Kendall* v. *Stokes,* 44 U.S. (3 How.) 87, 100, 11 L. Ed. 506, 513 (1845), the Court said:

> The law does not permit a party to be twice harassed for the same cause of action; nor suffer a plaintiff to proceed in one suit to recover the principal sum of money, and then support another to recover damages for the detention.

Again, in *Stark* v. *Starr,* 94 U.S. 477, 485, 24 L. Ed. 276, 278 (1877) this Court held:

> It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must

> present to the court, either by the pleadings or proofs or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.

Cited with approval in *In Re: The Haytian Republic,* 154 U.S. 118, 125, 38 L. Ed. 930, 932-933, 14 S. Ct. 992, 995 (1894).

Petitioner Shapero has pending in federal district court his §1983 action on the same subject of which he here complains. If he is to recover any attorneys' fees, it is in that action, not this one.

CONCLUSION

Petitioner Shapero has played fast and loose with the judicial process: first seeking permission from the Advertising Commission to send his solicitation letter and then abandoning that proceeding when he obtained an adverse ruling; next seeking an advisory ruling about his proposed letter from the Ethics Committee and then treating that ruling as if it had denied permission to him to send the letter (a ruling already made by the Advertising Commission which he did not appeal); then bringing in federal district court what is specifically alleged to be a §1983 action about the same subject and seeking therein attorneys' fees (necessarily under §1988); and now contending that the advisory

ruling proceeding was an enforcement action under §1983 and that he is therefore entitled to attorneys' fees under §1988. Under the ruling of this Court in *Webb v. Dyer County Board of Education,* 471 U.S. 234, 85 L. Ed. 233, 105 S. Ct. 1923 (1985), attorneys' fees incurred in an administrative proceeding not necessary to the maintenance of a §1983 action are not recoverable. So too, the attorneys' fees and expenses incurred by Shapero in this administrative proceeding are not recoverable. The Court should leave Shapero where it finds him and let the District Court dispose of his §1983 case and his request for attorneys' fees in that case.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. 83-0129-L(B)

RICHARD D. SHAPERO - - - - - *Plaintiff*

v.

KENTUCKY BAR ASSOCIATION

AND

SUPREME COURT OF KENTUCKY - - - *Defendants*

AMENDED AND SUPPLEMENTAL VERIFIED COMPLAINT

The Plaintiff, Richard D. Shapero, for his claims against the Defendants, states as follows:

I. INTRODUCTION

1. This is an action pursuant to 28 U.S.C. Section 1343 and 42 U.S.C. Section 1983 brought because of the censorship by Defendants of Plaintiff's legal advertisements in violation of the First, Fifth and Fourteenth Amendment rights of the Plaintiffs.

II. JURISDICTION

2. This Court has jurisdiction under the provisions of 28 U.S.C. Section 1343, in that this is an action brought pursuant to 42 U.S.C. Section 1983.

III. PARTIES

3. Plaintiff, Richard D. Shapero, is a citizen of the United States and an attorney admitted to practice law in the Commonwealth of Kentucky. Shapero has in the past advertised and desires in the future to advertise legal services in the Commonwealth of Kentucky which advertisements require prior approval by the Defendants under Rule 3.135 of the Rules of the Supreme Court of Kentucky (hereafter the "Supreme Court").

4. The Defendant, Kentucky Bar Association (hereafter the "Association") is an entity created pursuant to the laws of the Commonwealth of Kentucky (SCR 3.025) and at all times herein was and is acting under color of and pursuant to that law.

5. The Defendant, Supreme Court of Kentucky, is the highest judicial authority in the Commonwealth of Kentucky and at all times herein was acting under color of and pursuant to state law.

FACTS

6. The Defendants have adopted and caused to be amended various versions of SCR 3.135. See Exhibit A for the most recent version.

7. SCR 3.135 is vague and indefinite, constitutes a prior restraint, has a chilling effect on speech, does not provide due or speedy process for the adjudication of advertising claims and is accordingly violative of the First, Fifth and Fourteenth Amendments to the Constitution of the United States. Specifically, SCR 3.135 is defective facially and as implemented in that:

a. It does not guarantee or provide for cross examination or provide adequate notice of alleged deficiencies in advertisements;

b. It does not provide for speedy relief, speedy appeals, or prompt, effective judicial review;

c. It creates impermissible and unsubstantiated inferences;

d. It impermissibly shifts the burden of proof to the person whose actions are being censored;

e. It imposes a prior restraint;

f. It contains vague, overbroad and/or underdefined terms which chill the exercise of free speech; and

g. It does not provide for a separation of the Bar Association's decision-making functions from its prosecutorial functions.

8. Until March, 1987, SCR 3.135(5)(b)(1) provided that:

> A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

9. In 1985, Plaintiff Shapero sought a determination from the Advertising Commission and, ultimately, from the Kentucky Supreme Court, that SCR 3.135(5)(b)(i) was unconstitutionally vague, overbroad and contrary to the First and Fourteenth Amendments of the United States Constitution. The Advertisng Commission determined that the rule was unconstitutional. See Exhibit B.

10. While the Kentucky Supreme Court agreed and deleted the rule in question, it adopted and applied on an ex post facto basis to Shapero and to all lawyers in Ken-

tucky the following new rule which was effective in March of 1987.

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The terms "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

See Exhibit C.

11. This rule is contrary to the holding of the United States Supreme Court in *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. ___, 85 L. Ed. 2d 652, 670 (1985), that "an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding legal rights of potential clients."

12. Prior to 1982, Shapero had obtained the necessary approvals from the Ethics Committee of the Bar Association of certain advertisements which have since been regularly employed in advertising media. These advertisements were subsequently approved again by an agreement entered into in this Court in settlement of certain litigation. See Exhibit D. Pursuant to this Agreement the above identified advertisements were deemed approved by the Association and the Supreme Court.

13. The Agreement also envisioned the adoption of new rules by the Supreme Court which were to guarantee that

once advertisements were approved, they were approved for all time.

14. In 1986 the Supreme Court of Kentucky adopted a new rule, SCR 3.135(5)(b)(ii), which states as follows:

> Any advertisement or mailing authorized and approved by this Commission that lists or suggests areas of an attorney's practice must state in print of equal size and character to the print listing or suggesting the areas of an attorney's practice the following: "This is an advertisement. Kentucky law does not certify specialties of legal practice."

This rule is vague, overbroad, indefinite and constitutionally infirm. This rule was adopted without notice to Shapero or to other members of the Bar.

15. The Defendants have applied the rule referred to in Paragraph 14 so as to require reapproval of all advertising submitted by all advertisers in Kentucky including the advertising referred to in Paragraph 12. Even before the effective date of this adopted rule the Defendants began requiring compliance with the rule. As a result, the Defendants have breached the Agreement referred to in Paragraph 12.

16. The Bar Association has adopted a policy of discriminating against Shapero in the application of its advertising and disciplinary rules and regulations.

17. Without even a hint of an investigation, in 1986 the Bar Association issued a complaint against Shapero based upon his alleged failure to comply with advertising rules. Before filing the Complaint, the Bar Association was aware that the reason the rules were not allegedly complied with with respect to the advertisements in questions was because of an error on the part of the Yellow Pages and not Shapero's own error. Nonetheless the Bar Asso-

ciation initiated a complaint against Shapero. Ultimately, the proceedings were dismissed after Shapero further demonstrated his lack of culpability in the matter and that no rule had been violated.

18. The Bar Association initiated these proceedings against Shapero in violation of his First Amendment rights and because of his high profile as Kentucky's largest advertiser and as one who has been willing to stand up to the First Amendment violations of the Bar Association.

19. On information and belief, the Bar Association has denied equal protection to Shapero by enforcing its advertising rules against him more strictly than it has enforced these rules against other members of the Kentucky Bar.

20. Unless the actions of the Defendants are enjoined, Plaintiff will be irreparably harmed and they have no adequate remedy at law.

CLAIMS

COUNT I

21. Restates the allegations contained in Paragraphs 1 to 20.

22. The actions of the Defendants violated Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution. As a result this Court ought to enjoin enforcement of SCR 3.135, the operation of the Advertising Commission and, particularly, enforcement of SCR 3.135(5)(b)(1) and SCR 3.135(5)(b)(ii).

COUNT II

23. Restates the allegations contained in Paragraphs 1 to 22.

24. The actions of the Bar Association in discriminatorily enforcing its rules aganst Shapero violated the First,

Fifth and Fourteenth Amendments to the United States Constitution.

25. As a result, Shapero has been damaged in an amount in excess of $20,000.00 in that he has been required to hire attorneys in order to negotiate virtually every aspect of his constitutional right to advertise.

COUNT III

26. Restates the allegations contained in Paragraphs 1 to 25.

27. The actions of the Defendants constitute a restraint of trade and violate 15 U.S.C. Section 1.

COUNT IV

28. Restates the allegations contained in Paragraphs 1 to 27.

29. The actions of the Defendants in retroactively and without advance notice applying its rules to Shapero violated the First, Fifth and Fourteenth Amendments to the United States Constitution and constitute a breach of the Agreement with Shapero.

WHEREFORE, the Plaintiff demands as follows:

1. A restraining order and temporary and permanent injunctions enjoining the Defendants from enforcing SCR 3.135, 3.135(5)(b)(i), and SCR 3.135(5)(b)(ii) and from taking any other action against the Plaintiff which would constitute a restraint with respect to their advertisements;

2. A restraining order and temporary and permanent injunctions enjoining the Defendants from discriminatorily enforcing any rules of the Bar Association;

3. A declaration that the acts of the Defendants in adopting and implementing SCR 3.135(5)(b)(i) and SCR 3.135(5)(b)(ii) violate Plaintiff's rights under the First,

Fifth and Fourteenth Amendments of the Constitution of the United States and under the Agreement with Defendants;

4. A judgment on Shapero's behalf against the Defendants in an amount in excess of $20,000.00; and

5. Their costs herein expended, reasonable attorney's fees and all further relief to which they may be properly entitled.

(s) Donald L. Cox
Donald L. Cox
Mary Janice Lintner
Lynch, Cox & Gilman, P.S.C.
1800 Meidinger Tower
Louisville, Kentucky 40202
(502) 589-4215

I hereby certify that I have read the foregoing Amended and Supplemental Verified Complaint and the statements contained therein are true to the best of my knowledge and belief.

(s) Richard D. Shapero
Richard D. Shapero

Subscribed and sworn to before me by Richard D. Shapero this 26th day of May, 1987.
My commission expires: 5-11-88

(s) Donald L. Cox
Notary Public
Kentucky, State-at-large

[The exhibits referred to have not been reproduced.]

KENTUCKY ATTORNEYS ADVERTISING COMMISSION

IN RE: APPLICATION OF RICHARD SHAPIRO

This matter is before the Commission on a matter that is clearly answered by our Rules, but which presents a difficult question to the Commission under its responsibility to recommend rule changes. SCR 3.135(3)(e)(ii).

The applicant proposes to write a letter to be sent by regular mail to persons against whom real estate foreclosure actions have been filed, advising them of the possibility that a bankruptcy proceeding might help with their problems and informing them of applicant's availability as an attorney handling bankruptcy matters. On the face of it, the letter proposed is in violation of SCR 3.135(5)(b)(i). We have no difficulty finding it is a letter "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."

Our problem concerns the validity of that regulation in view of recent holdings of the United States Supreme Court on the subject of attorney advertising. *Zauderer* v. *Office of Disciplinary Council of Supreme Court of Ohio*, ___ U.S. ___, 105 S. Ct. 2265 (1985); *In Re R.M.J.*, 455 U.S. 191 (1982); *In Re Primus*, 436 U.S. 437 (1978); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978). We must view this problem in light of our rule which requires prefiling with the Commission of any such written solicitation. RCR 3.135(6).

In sum, the question before us, in considering whether or not to recommend changes, is whether the state can establish interests of sufficient magnitude in this situation to override the public's interest in receiving information on the availability of legal services. In other words, is there danger of deception or overreaching presented by mailings

to persons who because of some specific event may have an unusual need for a lawyer, or an unusual interest in having a lawyer explain to them their legal rights.

The problem is the tension that exists between the right of the state to regulate commercial advertising of the sort involved here and the right of free speech under the First Amendment to the Constitution of the United States. It should be noted that the regulation involved is a restriction on the time, place and manner of speech and it is not a restriction on content. We have no rules which prevents an attorney from placing an advertisement of this type in a medium of general circulation. Such a rule would be improper. *Zauderer* v. *Office of Disciplinary Council of the Supreme Court of Ohio, supra.* The state is free to fashion reasonable restrictions with respect to the time, place and manner of solicitation by the members of its bar. *In Re Primus, supra.* The state does have a recognized interest in regulating members whose profession it licenses, and who serve as officers of its courts. These special interests amply justify the application of narrowly drawn rules to proscribe solicitation that is in fact misleading, overbearing or involves other features of deception or improper influence. A state may forbid in-person solicitation for pecuniary gain under circumstances likely to result in those evils. *Ohralik* v. *Ohio State Bar Association, supra.*

The question to be answered is whether our rule restricting direct mail solicitation is drawn sufficiently narrow to prevent only those circumstances likely to result in misleading, overbearing, deception or improper influence, or whether the state interest could be satisfied by other, less restrictive means.

In *Ohralik* the Supreme Court ruled that the in-person solicitation of business by a lawyer was so fraught with potential for wrongdoing and so difficult to police that it justified the establishment of prophylactic measures pre-

venting it. The courts recognized the difference between the protection of commercial free speech which occurs in an area traditionally subject to governmental regulation, and other varieties of speech where the same type of regulation might be impermissible.

In *Ohralik* the Court specifically found that the free speech element is an essential but subordinate component of a situation of in-person solicitation by a lawyer of a prospective client. Unlike a public advertisement which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demand an immediate response without providing an opportunity for comparison or reflection. Under those circumstances, there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities or persons close to the solicited individual. Such situations are inherently conducive to overreaching and other forms of misconduct. The potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed lay person. Under such circumstances, the Court held, it is not unreasonable for the state to presume that an in-person solicitation by lawyers more often than not will be injurious to the person solicited.

Our situation here is somewhat different. The question we have before us is whether it is unreasonable for the state to presume, by the present regulations, that the direct mail solicitation by lawyers will more often than not be injurious to the person solicited. If we cannot make that presumption then we have little basis to justify our regulation. This is particularly true in view of our regulations which require pre-filing of such solicitations, so that the Commission has the opportunity to view these solicitations before they are received by the addressee.

The most recent case from the Supreme Court, *Zauderer*, does not specifically answer our question, but has language which suggests that our present regulation cannot be justified. That case makes it clear that while the state is free to prevent dissemination of commercial speech that is false, deceptive or misleading, where such activities are not involved speech may be restricted only as a result of substantial governmental interests through means that directly advance that interest. Blanket bans are impermissible, but rules prohibiting in-person solicitation are under some circumstances permissible. That case went on to point out the difference between face-to-face solicitation and print advertising generally, which poses much less risk of overreaching or undue influence.

While the *Zauderer* decision does seem to be based on the recognition that Ohio was regulating the content of the advertisement involved, not necessarily the time, place or method chosen for the solicitation, it is still evident from that decision that a written letter is quite different from a personal encounter and does not bear the same possibilities for overreaching, invasion of privacy, exercise of undue influence and outright fraud that justifies the proscription on in-person solicitation. *Zauderer* emphasizes that restrictions involving commercial speech that is not deceptive must be narrowly crafted to serve the state's purposes.

We must analyze the basis for preventing the direct mail solicitation here involved. Under our regulations we will be able to review the content of such solicitation because of our pre-filing requirements. Certainly, it is not improper for an attorney to advertise generally that he is able to represent individuals who have a specific problem or who have suffered as a result of a specific set of circumstances. Can it be wrong to direct this advertising specifically to those he is able to identify as being in a particular position most likely to benefit from legal serv-

ices? Unless we can say that the sort of direct mail solicitation involved here creates a serious risk of overreaching, exercise of undue influence or fraud, we cannot justify a blanket prohibition. It is not sufficient justification to limit advertising because it had a tendency or did in fact encourage the filing of lawsuits. The bottom line in *Zauderer* is this:

> An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding legal rights of potential clients.

105 S.Ct. at 2280.

In summary, we believe the regulation involved should be amended by the Kentucky Supreme Court in view of decisions discussed herein because of its impact on the First Amendment to the Constitution and the free speech provisions contained therein. However, until such amendment we have no choice but to disapprove the proposed advertisement as it does violate existing rules. We therefore find as follows:

1. The proposed advertisement of the Applicant is in violation of SCR 3.135(5) and it is not approved;

2. We recommend that the Advertising Rules be amended so that SCR 3.135(5)(b)(i) is deleted.

Dated this ____ day of September, 1985.

(s) Lindsey Ingram
Lindsey W. Ingram, Jr. Chairman
Attorneys Advertising Commission

ADVISORY OPINIONS
E-310

QUESTION: May an attorney write a letter and send it by regular mail to a specific individual that the lawyer has identified as being in need of the attorney's legal services?

ANSWER: NO.

OPINION

Several requests for advisory opinions have been forwarded to the Attorneys Advertising Commission and the Ethics Committee seeking approval of "targeted direct-mail advertising" to potential tort plaintiffs, victims of foreclosures, etc. Such target individuals can be readily identified in a perusal of the daily newspapers.

In response, the Attorneys Advertising Commission issued an opinion denying one of these requests under the authority of SCR 3.135(5)(b)(i), which provides:

> (b)(i) A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

When this rule is read alongside the definition of "advertising" contained in SCR 3.135(2), it is clear that the rule classifies as prohibited "solicitation" mailed communications to individuals known to have specific legal problems. The Commission applied the rule as written, despite arguments relating to the validity of the rule after *Zauderer* v. *Office of Disciplinary Council*, __ U.S. __, 105 S. Ct. 2265 (1985).

The Code of Professional Responsibility also prohibits this sort of client recruitment. DR 2-104(A) and SCR 3.130.

The Special Committee on the Model Rules of Professional Conduct is in the process of reviewing, amending and presenting new standards to replace the Code. Model Rules 7.1 and 7.2, like SCR 3.135, permit truthful, non-misleading advertising. However, the ABA version of Model Rule 7.3 still prohibits "solicitation" for "pecuniary gain". The rule provides in pertinent part:

> The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Consequently, the latest word from the ABA is consistent with SCR 3.135. In addition, it is possible to reconcile these standards with *Kentucky Bar Association* v. *Stuart*, 568 S.W.2d 933 (1979), which "approved" an attorney's mailings to commercial businesses, which were not inspired by a particular event.

No. 88-1703

Supreme Court, U.S.
FILED
JUN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD D. SHAPERO - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

On Petition For a Writ of Certiorari to the
Supreme Court of Kentucky

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD D. SHAPERO - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITIONER'S REPLY BRIEF

---

1. The decision below involves an important question which directly affects this Court's jurisdiction and is in conflict with this Court's decision in *Shapero* v. *Kentucky Bar Association*.

The only rationale advanced by the Kentucky Bar Association (hereafter "KBA") to justify the Supreme Court of Kentucky's amendment of the *Shapero I* decision on remand is that the Supreme Court of Kentucky in *Shapero I* "simply misspoke itself." KBA's Brief at 8. In addition, the KBA argues that "[n]one of [the errors corrected by the Supreme Court of Kentucky in *Shapero II* and *Shapero III*] affected this Court's essential ruling. . . ." KBA's Brief at 9.

The KBA, however, fails to discuss, let alone distinguish *Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 253 (1872), and the other cases which establish the invariability and conclusiveness of a judgment of the Su-

preme Court of the United States "upon the law and facts presented to it." *Ex parte Howard,* 76 U.S. (9 Wall.) 175, 183 (1869). Thus, the KBA simply ignores the holding in *In re Sanford Fork & Tool Co.,* 160 U.S. 247 (1895) that a lower court cannot vary, examine or review "*even for apparent error,* upon any matter decided on appeal." *Id.* at 255 (emphasis supplied). Accordingly, the Supreme Court of Kentucky, under the guise of correcting errors, may not recast the facts or the law presented to the Supreme Court of the United States so as to fundamentally alter the character of the decision reviewed by that Court.

The Supreme Court of Kentucky stated in *Shapero II* that it had erred in its *Shapero I* decision when it held that it had denied Shapero's request to mail out the letter in question. Therefore, the Supreme Court of Kentucky revised its opinion to state that Shapero's letter was never before the court or the KBA Ethics Committee.[1] Appendix to Petition for Certiorari at

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[1]The KBA's response to the Petition for Certiorari flatly contradicts the Supreme Court of Kentucky's holding in *Shapero II* that "the Ethics Committee never reviewed Mr. Shapero's request for permission to send the letter." Appendix to Petition for Certiorari at 31a. In its Brief, the KBA states on page 3 that Shapero "requested an Advisory Opinion from the Committee on Legal Ethics as to the propriety of his proposed letter of solicitation. . . ." This disagreement by the KBA with the Supreme Court of Kentucky surely would be resolved in favor of the KBA for the Ethics Committee's own opinion specifically referred to the Shapero letter when it stated that "[s]everal requests for advisory opinions have been forwarded . . . seeking approval of 'targeted direct mail advertising' to . . . victims of foreclosures. . . ." See Advisory Opinion E-310, reproduced in the Appendix to KBA's Brief at 14a.

31a. As a consequence, the Supreme Court of Kentucky also held that its opinion in *Shapero I* was merely an advisory opinion which "had no legally binding effect on Shapero." *Id.* By making these changes in the facts and the law respecting its decision in *Shapero I*, the Supreme Court of Kentucky retrospectively fundamentally altered *Shapero I* from a decision which was reviewable by this Court to one which was not.

It is beyond question that this Court only reviews cases or controversies and that it will not issue or review advisory opinions. See *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89 (1947), and *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) where this Court refused to review an administrative decision which only had "the force of a recommendation to the President" because it "would be to render an advisory opinion. . . ." Therefore, altering *Shapero I* from a determination of the legal rights of the Petitioner to an advisory opinion not binding on Shapero or anyone else (KBA's Brief at 13) fundamentally alters the *Shapero I* decision from a reviewable to a non-reviewable decision. The unavoidable implication of this alteration is that, according to the Supreme Court of Kentucky, this Court should never have decided the Shapero case.

Likewise, if the Shapero letter were not before the Supreme Court of Kentucky, there would have been no concrete commercial speech case for this Court to review. The First Amendment overbreadth doctrine does not apply to commercial speech and professional

advertising cases. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 381 (1977), and *Village of Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982). Therefore, in commercial speech cases, this Court will not invalidate a rule prohibiting commercial speech except in a given, concrete fact situation. Absent the Shapero letter, there was no given fact situation and no reviewable case.

2. The decision below conflicts with recent decisions of this Court and of Federal Courts of Appeals and with the legislative history of the Civil Rights Attorney's Fees Act of 1976.

Without ever referring to the legislative history of the Civil Rights Attorney's Fees Act of 1976 or to the basic concept of the private attorneys general which it embodied, the KBA nonetheless argues that the action brought by Shapero in the Supreme Court of Kentucky and the Supreme Court of the United States was not "any action or proceeding to enforce a provision of [42 U.S.C. Sections 1981-1983] . . ." warranting an award of attorney's fees under 42 U.S.C. Section 1988.[2] Rather, the KBA argues that "[t]he primary reason why [Shapero] is not entitled to recover [attorneys'] fees in this proceeding is because he 'failed to mention Section 1983 in his Brief to [the Supreme Court of Kentucky] when [it] reviewed

[2]Shapero has not filed a claim for attorneys' fees for the proceedings before the Ethics Committee of the KBA; his claim is limited to proceedings in the Supreme Court of Kentucky and the Supreme Court of the United States.

the Board of Governors Advisory Opinion.' *Shapero II*, 763 S.W.2d at 127." KBA's Brief at 10.

This statement is patently false. This very issue *was* addressed by Shapero in his first brief in the Supreme Court of Kentucky in *Shapero I* in which he pointed out to that court that his petition was, in fact, a Section 1983 claim:

> This Court also appears to have exclusive jurisdiction over Shapero's federal constitutional claims arising *under 42 U.S.C. Section 1983* since federal courts must abstain from entertaining federal constitutional challenges to state disciplinary rules (even under the First Amendment) until the state has had an opportunity to rule. *Middlesex Ethics Committee* v. *Garden State Bar Assn.*, 457 U.S. 423 (1982).

(See Brief of Petitioner Richard D. Shapero in the Supreme Court of Kentucky, filed July 8, 1986, page 3, note 4, emphasis supplied).[3]

The KBA also argues that attorneys' fees are not warranted because the court's ruling in *Shapero I* "had no binding effect on Petitioner" and therefore, he was not deprived of any of his "civil rights as a consequence of the Court's ruling." KBA Brief at 11.

[3]Even if Section 1983 had not been specifically mentioned in his Brief, it would not affect Shapero's entitlement to attorneys' fees under Section 1988. In *Americans United for Separation of Church and State* v. *School District of Grand Rapids*, 835 F.2d 627, 632-34 (6th Cir. 1987), the Sixth Circuit ruled that it was not necessary to specifically mention 42 U.S.C. Section 1983 in order to recover Section 1988 attorneys' fees as long as the relief obtained vindicated civil rights of the type protected under Section 1983.

According to the KBA and the Supreme Court of Kentucky, Mr. Shapero remains unaffected by the Supreme Court of Kentucky's decision until he has mailed the letter in question, disciplinary proceedings have been instituted, and thereafter he has been enjoined or disciplined. *Id.* However, this position flies directly in the face of established precedent of this Court and of other federal courts.

In Spencer v. *Honorable Justices of Supreme Court of Pennsylvania*, 579 F. Supp. 880 (E.D. Penn. 1984), *aff'd sub nom Spencer* v. *Supreme Court of Pennsylvania*, 760 F.2d 261 (3d Cir. 1985), an attorney sought to challenge Pennsylvania's targeted direct mail solicitation prohibition. The Supreme Court of Pennsylvania argued that there was no concrete case or controversy because disciplinary action had not been taken against Mr. Spencer. The Pennsylvania federal courts disagreed, holding that since a plaintiff "suffers present injury and an irretrievable loss of first amendment rights to the extent that he obeys the disciplinary rules and thus foregoes his right to engage in arguably protected speech . . . [a] plaintiff is not first required to violate the disciplinary rules and risk his legal career on the hope that his constitutional arguments will be accepted in defense of quasi-criminal proceedings." *Id.* at 884. *See also, Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973); and *Epperson* v. *Arkansas*, 393 U.S. 97 (1968).

In addition, the KBA argues that Shapero is not entitled to attorneys' fees because his appeal to the Supreme Court of Kentucky was, "at best, [an] administrative proceeding[] not necessary to the maintenance by him of his action in Federal Court." KBA's Brief at 12. There are at least three fundamental errors in this position.

First, even if the proceeding before the Supreme Court of Kentucky is characterized as administrative instead of judicial, the awarding of attorneys' fees incurred in that proceeding would be appropriate under Section 1988 because the proceedings were mandatory administrative proceedings such as those in *New York Gaslight Club* v. *Carey,* 447 U.S. 54 (1980). Because of *Middlesex Ethics Committee* v. *Garden State Bar Association,* 457 U.S. 423 (1982), Shapero was compelled to complete bar association-imposed administrative proceedings before he could resort to an independent Section 1983 action. Since Shapero was precluded by *Middlesex* from bringing his Section 1983 action to challenge the rule and its application to his letter in federal court, he was forced to bring it in the Supreme Court of Kentucky. See *Adams* v. *Attorney Registration and Disciplinary Commission,* 600 F. Supp. 390, 392, 393 (E.D. Ill. 1984), *aff'd* 801 F.2d 968 (7th Cir. 1986), where the court, applying *Middlesex,* abstained from ruling on a challenge to Illinois' targeted direct mail rules until the Illinois Supreme Court Committee on Professional Responsibility had first refused to entertain the challenge.

Second, the KBA cites no law that a proceeding brought before the Supreme Court of Kentucky is anything but judicial in nature. As the Supreme Court of Kentucky noted in *Ex parte Auditor of Public Accounts*, 609 S.W.2d 682, 683, 685 (Ky. 1980), Section 109 of the Kentucky Constitution states that "[t]he *judicial power* of the Commonwealth shall be vested exclusively in one Court of Justice . . ." (emphasis supplied), and Section 110 of the Kentucky Constitution empowers the Supreme Court of Kentucky to exercise appellate jurisdiction only. The Supreme Court of Kentucky further held in *Ex parte Auditor* that since the KBA was an arm of the Supreme Court of Kentucky, the KBA could not be sued in any of the other courts of the state and the Supreme Court of Kentucky was the only forum in which the controversy could be heard and officially resolved. *Id.* at 683.[4]

Finally, the KBA does not explain why, in any event, attorneys' fees would not be recoverable for the proceeding in the Supreme Court of the United States, which certainly was a proceeding in vindication of civil rights for purposes of Section 1988.

[4]There is also no indication anywhere in the Supreme Court of Kentucky's opinion in *Shapero II* and *Shapero III* that its decisions were anything but judicial in character even though in its brief in *Shapero II*, the KBA attempted to convince the Supreme Court of Kentucky that the proceeding in *Shapero I* was merely administrative. See Response of KBA In Opposition to Petitioner's Motion Requesting Attorneys' Fees and Expenses, served October 26, 1988, pp. 7-8.

3. Petitioner's pending Section 1983 action does not preclude the recovery of attorneys' fees in this proceeding.

The final argument raised by the KBA is that because there is a pending Section 1983 action in which attorneys' fees could be awarded, this Court should not order an award of attorneys' fees in this proceeding.[5]

However, the cases cited by the KBA involved attempts to obtain relief in a junior proceeding after a senior proceeding on the same issues had been commenced. In this case, on the other hand, the senior proceeding is the Shapero case emanating from the Supreme Court of Kentucky. The district court action challenging the Kentucky targeted direct mail rule was filed *after* the Supreme Court of Kentucky had issued its decision in *Shapero I* and involved questions relating not only to the validity of the rule adopted by the Supreme Court of Kentucky, but also questions of the enforceability of an agreement between the KBA and Shapero entered into several years before in settlement of earlier unrelated litigation.

Moreover, the courts in the best position to evaluate and award attorneys' fees are the courts before whom the Shapero case was argued. Having another court re-review all the work done in this Court and before the Supreme Court of Kentucky would be a waste of judicial efforts because the courts before whom that

[5]Shapero does not deny that attorneys' fees *could be* awarded by Judge Ballantine in the United States District Court in the event certiorari is denied. However, that fact alone does not provide a basis for this Court or the Supreme Court of Kentucky to deny an award of attorneys' fees under Section 1988.

work was done are more familiar with the quality and quantity of work performed before them.

CONCLUSION

The Brief of the KBA has failed in any logical fashion to demonstrate that certiorari should not be granted in this case. The actions of the Supreme Court of Kentucky, in revising its opinion in *Shapero I,* involved much more than the incidental correction of a typographical error. Permitting an inferior court, after reversal, to change its decision from one which is reviewable to an unreviewable advisory opinion most assuredly raises important questions about this Court's jurisdiction.

The KBA has failed to dispute Shapero's assertions that certiorari should also be granted because the ruling of the Supreme Court of Kentucky in denying his attorneys' fees both before that court and the Supreme Court of the United States is at odds with the legislative history of 42 U.S.C. Section 1988 and with numerous decisions of this Court and of federal appellate courts. The decision of the Supreme Court of Kentucky should be reversed and an award of attorneys' fees should be summarily ordered by this Court.

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DAVID J. ROPER